(12)

No. 93-908

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

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CHARLES J. REICH,

*Petitioner,*

v.

MARCUS E. COLLINS, *et al.*

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**On Writ of Certiorari to the Supreme Court of Georgia**

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## BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES, THE MILITARY COALITION AND DESIGNATED FEDERAL RETIREES IN KANSAS, NEW YORK, ARIZONA, VIRGINIA AND WISCONSIN IN SUPPORT OF PETITIONER

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MICHAEL J. KATOR *
STEPHEN Z. CHERTKOF
KATOR, SCOTT & HELLER
1275 K Street, N.W.
Suite 950
Washington, D.C. 20005-4006
(202) 898-4800

* Counsel of Record

(Additional Counsel Listed on Signature Page)

April 15, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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The National Association of Retired Federal Employees ("NARFE"), the Military Coalition and designated federal retirees in Kansas, New York, Virginia, Arizona and Wisconsin file this brief *amici curiae* in support of petitioner and urge this Court to reverse the decision of the Supreme Court of Georgia.

### INTEREST OF AMICI

*Amici* are NARFE, the Military Coalition and designated federal retirees in Kansas, New York, Virginia, Arizona and Wisconsin. NARFE is a not for profit corporation that is dedicated to serving and protecting the

interests of federal civil service retirees and the federal retirement systems. As more fully set out in its separate *amicus* brief in support of the petition for certiorari, NARFE and its members are vitally interested in the issue of taxpayers' entitlement to receive refunds of unconstitutional state taxation.

The Military Coalition is a voluntary association of 24 military-related organizations that was formed six years ago. *See* App. A at 1a-8a (providing a listing of its component organizations). Collectively, its constituent organizations represent the interests of almost two million members who are retired, reserve and active members of the Uniformed Services of the United States. As more fully stated in its separate *amicus* brief in support of the petition for certiorari, the Military Coalition is dedicated to providing a cohesive means for the study and advocacy of issues impacting upon the maintenance of a strong national defense and the preservation of rights and benefits its varied constituents have earned through years of dedicated service to the United States. It and the members of its constituent organizations are affected directly by the decision below.

The designated federal retirees in Kansas, New York, Arizona, Virginia and Wisconsin are all class representatives of suits in their respective states seeking relief for the unconstitutional imposition of taxes on their federal pensions, or the failure to refund such taxes. *See* Appendix A at 8a-9a (listing individual class representatives). They, or litigants from their states, have previously appeared in this Court as parties seeking the same or similar relief.[1]

[1] Counsel for petitioner and respondent have consented to the filing of this brief. Their letters of consent have been filed with the Clerk in accordance with Rule 37.2.



## STATEMENT

Over the past five Terms, this Court has considered and decided three landmark state taxation cases: *McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); and *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993). In *McKesson*, this Court reaffirmed longstanding Due Process principles allowing states to exact taxes without providing predeprivation process, but requiring in such circumstances clear and certain postdeprivation remedies. 496 U.S. at 31. In *Beam*, this Court ruled that states could not, except perhaps in the most limited of circumstances, rely on nonretroactive decision-making to deny refunds of unconstitutionally exacted taxes. 111 S. Ct. at 2445. In *Harper*, this Court integrated the holdings in *McKesson* and *Beam*, and held that Virginia must apply *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), retroactively and that if the state did not have adequate predeprivation procedures or if it otherwise "prompted" taxpayers to pay their taxes and have their objections entertained thereafter, Due Process requires it to provide "meaningful backward-looking relief." 113 S. Ct. at 2519-20.

In addition to sharing a place in the pantheon of state taxation cases, these three tax cases share another less beneficent characteristic: in all of these cases, notwithstanding litigation consuming the better part of a decade, no court has ordered a refund of any of these concededly unconstitutional taxes.[2]

[2] The McKesson Corporation has been litigating its tax refund action since 1987, but has just recently settled for a partial refund. The litigation continues with other taxpayers. *See* State Tax Notes (Mar. 14, 1994) at 688. Similarly, the James B. Beam Distilling Co. has been in court since 1984, but, with the exception of its victory in this Court, it has been thwarted at every turn. *See James B. Beam Distilling Co. v. Georgia*, 437 S.E. 2d 782, 263 Ga.

This is not to say that every state court has had difficulty discerning the commands of *McKesson*, *Beam* and *Harper*. To the contrary, several state courts have addressed tax challenges in light of these authorities and have correctly determined that these cases required refunds. *See, e.g., Hagge v. Iowa Department of Revenue and Finance*, 504 N.W.2d 448 (Iowa 1993) (requiring refund of taxes because state did not provide meaningful predeprivation remedy); *Strelecki v. Oklahoma Tax Commission*, No. 77615 (Okl. Sept. 28, 1993) (WESTLAW 1993 WL 379008), *aff'd as modified on reh'g*, (Okl. Mar. 23, 1994) (WESTLAW 1994 WL 102224) (same); *Service Oil Inc. v. North Dakota*, 479 N.W. 2d 815, 821-22 (N. Dak. 1992) (same); *Cambridge State Bank v. James*, No. CO-89-2097 (Minn. Apr. 1, 1994) (WESTLAW 1994 WL 106516) (same); *Nevada v. Scotsman Mfg. Co., Inc.*, 109 Nev. 252, 849 P.2d 317 (1993) (same). But unfortunately, other courts, like the court below, have had trouble following the teachings of these cases. They have transformed state remedies into a shell game of now-you-see-it, now-you-don't and precedent into cheesecloth. *See, e.g., Bass v. South Carolina*, 414 S.E. 2d 110, 112, 307 S.C. 113 (1991), *vacated*, 113 S. Ct. 3025 (1993) (construing a statute providing a refund remedy for "*any* taxpayer [for] *any* license fee or tax imposed under [the taxation title]. . ." to reach only "license-type fees and taxes," *rev'd*, 113 S. Ct. 3025 (settled on remand)).[3]

609 (1993), *petition for cert. pend'g*, No. 93-1140. And notwithstanding their victory in this Court, the *Harper* plaintiffs are still meeting defeat at every turn in the Virginia state courts. *See* Letter Opinion, No. CL891080 (Cir. Ct. Alexandria City Jan. 7, 1994).

[3] *See also* Pet. App. A and D. The court below has expediently shuffled and reshuffled the remedies that supposedly are available to Georgia taxpayers. First, in dissolving the injunctive relief the federal retirees obtained for the 1988 taxes, the court below held that Georgia's refund statute was an adequate remedy at law. *Collins v. Waldron*, 259 Ga. 582, 583, 385 S.E. 2d 74, 75 n.1 (1989). Then, when the federal retirees sought relief under the refund statute, the court below concluded that that statute did not apply. *Reich v. Collins*, 262 Ga. 625, 422 S.E.2d 846 (1992), *vacated*, 113 S. Ct. 3028 (1993). The court "t[ook] this opportunity" to create an entirely new remedy: the federal retirees were only entitled to a refund if they had paid their taxes under protest. *Id.*, 262 Ga. at 629, 422 S.E.2d at 849. Now, after remand of this case and *Beam*, and without any mention of payment under protest, the court below assumed that the refund statute applies to the taxpayers in *Beam* (who do not have standing under that statute), 437 S.E. 2d at 784 n.3, but it does not apply to federal retirees (who indisputably would have standing under that statute).



*Amici* submit that this Court in *Harper* spoke with unmistakable clarity in holding that states that prompt taxpayers to pay their taxes before raising a challenge must provide taxpayers a clear and certain remedy for any unconstitutional exaction. Nonetheless, it appears that unless this Court reiterates its holding in *Harper* with painstaking detail and clarity, taxing authorities will continue to advance lame and contrived arguments to defeat or delay taxpayers' recoveries. *Amici* urge this Court to reverse the court below in bold and unequivocal terms.

## ARGUMENT

### I. STATES THAT PROMPT TAXPAYERS TO PAY THEIR TAXES BEFORE CHALLENGING THE TAX'S VALIDITY MUST PROVIDE CLEAR AND CERTAIN POSTDEPRIVATION REMEDIES

In *Harper* this Court laid out with what seemed unmistakable clarity the calculus for determining whether states must provide taxpayers with postdeprivation remedies:

> If Virginia "offers a meaningul opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing," the "availability of a predeprivation hearing constitutes a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause." On the other hand, if no such predeprivation remedy exists, "the

> Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation."

113 S. Ct. at 2519, *quoting McKesson*, 496 U.S. at 38 n.21 and 31.

This Court further explained that states that place taxpayers under "constitutionally significant duress" to pay before challenging the tax do not provide meaningful predeprivation remedies:

> A State incurs this obligation [to provide meaningful backward-looking relief] when it "places a taxpayer under duress promptly to pay a tax when due and relegate him to a postpayment refund action in which he can challenge the tax's legality." A State that "establish[es] various sanctions and summary remedies designed" to prompt taxpayers to "tender . . . payments *before* their objections are entertained or resolved" does not provide taxpayers "a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity." Such limitations impose constitutionally significant " 'duress' " because a tax payment rendered under these circumstances must be treated as an effort "to avoid financial sanctions or a seizure of real or personal property."

113 S. Ct. at 2519-20 n.10, *quoting McKesson*, 496 U.S. at 31, 38 and 38 n.10 (emphasis original).

There would seem to be very little wiggle room in this analysis. In determining a state's obligation to provide postdeprivation relief, the first question is whether the state provides any means by which a taxpayer can withhold payments yet still challenge the validity of the tax. If there is no predeprivation remedy, *e.g.*, if a state proscribes suits to enjoin the imposition of a tax and requires a taxpayer to pay his taxes before he can file suit



to challenge the tax's validity, then Due Process requires the state to provide clear and certain postdeprivation relief. *See, e.g.* Va. Code Ann. § 58.1-1831 (prohibiting injunctive suits in tax cases) and § 58.1-1825 (requiring payment of tax as a prerequisite to filing suit).

If state law does provide a predeprivation remedy, then the question is whether this predeprivation remedy is "meaningful" and "adequate." *Harper*, 113 S. Ct. at 2519 and 2520. The meaningfulness and adequacy of any predeprivation process turn on the clarity and certainty of that process[4] and the presence of "constitutionally significant duress," *i.e.*, "sanctions and summary remedies designed to prompt taxpayers to 'tender . . . payments *before* their objections are entertained or resolved.' " *Harper*, 113 S. Ct. at 2519 n.10, *quoting McKesson*, 496 U.S. at 38 (emphasis original).

### A. True Predeprivation Remedies Are Rare

In *McKesson*, this Court identified two types of predeprivation process: "authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment" or "allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding." 496 U.S. at 36-37. While this Court perhaps did not intend this list to be exhaustive, *Amici* submit that, at least in the context of unconstitutional taxation, these may well be the only possible ways to challenge a tax prior to paying it.

For example, in *Harper*, the Department of Taxation argued that it provided an administrative mechanism through which taxpayers could withhold their payments yet still challenge the taxation before the tax commis-

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[4] The substantive command of Due Process is that the taxpayer be given a clear and certain remedy designed to prevent the deprivation from becoming permanent. *McKesson*, 496 U.S. at 40. Whether that opportunity is provided before or after the exaction of taxes, in either case it must be clear and certain to be constitutionally sufficient.

sioner. *See Harper v. Virginia Department of Taxation*, No. 91-794 Br. of Resp. at 46-47. It is the unusual administrative tribunal, however, that has the power to provide relief from unconstitutional taxation. *See, e.g., Strelecki*, 1993 WL 379008 at *4 ("The [Tax] Commission *qua* administrative agency is powerless to strike down a statute for constitutional repugnancy."); *Flint River Mills v. Henry*, 234 Ga. 385, 386, 216 S.E.2d 895, 896-97 (1975) (same); *George v. Department of Natural Resources*, 250 Ga. 491, 492, 299 S.E.2d 556, 557 (1983) (same). Thus, in the case of unconstitutional taxation, unless the administrative agency has the power to invalidate the statute it is charged with enforcing, resort to an administrative agency is not a predeprivation remedy.[5]

Similarly, while declaratory and injunctive relief could constitute a predeprivation remedy, declaratory relief alone could not. For example, when taxpayers in Virginia have been able to obtain declaratory relief, they were still liable for the taxes that had accrued during the pendency of their challenge. *See Perkins v. Albemarle County*, 214 Va. 240, 198 S.E.2d 626, *aff'd and modified on reh'g*, 214 Va. 416, 200 S.E.2d 566 (1973) (refusing to refund taxes paid during pendency of challenge). Because declaratory relief by itself is merely prospective relief, it does not satisfy the requirements of federal law. *McKesson*, 496 U.S. at 31.

To constitute a predeprivation remedy, a procedure must provide the taxpayer the opportunity to obtain final

[5] The court below held that judicial review of the Tax Commissioner's administrative decision is available and that such review constitutes a predeprivation remedy. Pet. App. 5a. In order to obtain judicial review, however, a taxpayer must post a bond in an amount in excess of the tax in dispute. Accordingly, while the taxpayer is not deprived of the taxes that are due as a precondition to bringing suit, he is deprived of the cost and the security for the bond. Thus, because the bond requirement is simply a deprivation of a different order, judicial review of the administrative decision is not a *pre*deprivation remedy.



relief from the taxation without having to endure a deprivation of property along the way. If a taxpayer must pay his taxes or post a bond or suffer a lien to be placed upon his property to secure relief, then he does not have a predeprivation remedy. *See, e.g.* O.C.G.A. § 48-6-38 (requiring bond for double the amount of tax in dispute). In all such circumstances, Due Process requires the states to provide meaningful backward-looking relief.

### B. Only Predeprivation Remedies That Are Clear and Certain and Free of Duress Are Constitutionally Sufficient

It is not enough, of course, that a state may provide a predeprivation remedy to its taxpayers. In order to be absolved of the constitutional obligation to provide "meaningful backward-looking relief," a state must provide meaningful and adequate predeprivation process. *Harper*, 113 S. Ct. at 2519-20. To meet this test, a predeprivation remedy must be clearly available to the taxpayers, it must provide a certainty of relief, and it must be free of "constitutionally significant duress." *Id.*

The clarity of any remedy must be determined from the perspective of the taxpayer. A state's remedial procedures must be sufficiently straightforward and apparent that a reasonable taxpayer would be able to discern the necessary steps. That is, if a state designs a Rube Goldberg remedial scheme that requires the taxpayer to proceed in different forums seeking piecemeal relief, and that method can only be discerned with hindsight, then it has not created a "clear" predeprivation remedy. *See, e.g., Cambridge State Bank v. James*, slip op. at 9-10 (because avenue for challenging the tax prior to payment was discernible only with hindsight, "this mechanism [did not] provide[] the 'meaningful opportunity' called for by *McKesson*.").

The second component to clarity focuses on the existence of the predeprivation remedy within the state's entire

remedial scheme. If a state has multiple remedies simultaneously available, its remedial scheme as a whole becomes unclear if the state closes off a remedy once the taxpayer has elected that particular route. That is, if a state has a cumbersome but valid predeprivation remedy and an attractive refund statute, the predeprivation remedy is unclear within the entire remedial scheme if the state entices taxpayers to pursue the postdeprivation refund remedy and then eliminates that remedy. The state's remedial scheme does not pass constitutional muster just because, in hindsight, there was a remedy that the state did not eliminate.

The certainty inquiry focuses not on the taxpayer, but instead on the relief available under any predeprivation procedure. The taxpayer must be *entitled* to be heard on the merits of his challenge to the validity of the tax. If the court has the discretion whether to entertain the challenge, as is common in declaratory and injunctive proceedings[6] then the taxpayer cannot be certain that he will be heard. And, of course, if the tribunal has the discretion to deny relief notwithstanding the determined invalidity of the tax, then the remedy is uncertain. *See, e.g.*, Ariz. Rev. Stat. Ann. § 35-196.03 (requiring legislative appropriation to refund judicially invalidated taxes.) A remedy is certain only if the taxpayer is *entitled* to be heard and *entitled* to avoid the taxation if he persuades the tribunal that the tax is invalid.

Finally, even a clear and certain predeprivation remedy is constitutionally inadequate if the taxpayer is subject to "constitutionally significant duress." *Harper*, 113 S. Ct. at 2519-20 n.10. For example, even though the taxpayer

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[6] *See, e.g., Collins v. Waldron*, 259 Ga. at 583, 385 S.E. 2d at 75 n.1 (refusing jurisdiction over action for declaratory and injunctive relief on grounds that there was an adequate remedy at law); *Haughton v. Lankford*, 189 Va. 183, 198, 52 S.E. 2d 111, 117 (1949) (courts should be slow to accept jurisdiction for declaratory and injunctive relief in tax cases).



in *Service Oil Co.* had available declaratory and injunctive relief, the court held that North Dakota was required to provide meaningful backward-looking relief. Because the taxpayer was not immune from the imposition of sanctions and penalties and because the state had summary remedies available to collect the taxes in dispute, the availability of declaratory and injunctive relief was insufficient to satisfy the requirements of Due Process. *Service Oil Inc.*, 479 N.W.2d at 821-22. *See also Hagge*, 504 N.W.2d at 451 (putative availability of declaratory and injunctive relief did not relieve state of requirement to provide postdeprivation relief.)

A tax scheme that imposes the risk of "financial [or criminal] sanctions or a seizure of real or personal property" on any taxpayer who pursues a predeprivation remedy is not constitutionally adequate. *Harper*, 113 S. Ct. at 2519-20 n.10. A taxpayer is subject to "constitutionally significant duress" when the state imposes penalties on him if he mounts an unsuccessful challenge to the validity of his taxes. *McKesson*, 496 U.S. at 38, n.21; *Atchison T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 286-87 (1912). What happens to taxpayers who *successfully* challenge a tax is irrelevant to the issue of duress; the test centers on the *risks* faced by taxpayers who challenge a tax and lose:

> As appears from the decision below, the plaintiff could have had no certainty of ultimate success, and we are of the opinion that it was not called upon to *take the risk* of having its contracts disputed and its business injured, and of finding the tax more or less nearly doubled in case it finally had to pay. In other words, we are of the opinion that the payment was made under duress.

*Atchison*, 223 U.S. at 286-87 (emphasis added).

As this Court recognized in *Atchison*, the critical inquiry is whether the taxpayer who withholds payment is on reasonably equal ground when determining whether to pay

or challenge the assessment of taxes. *Atchison*, 223 U.S. at 286. The existence of statutory sanctions and summary collection procedures, including penalties, extramarket interest, and the placement of liens on delinquent taxpayers' property, all serve to tilt the playing field in favor of paying first. If a taxpayer will be charged interest on his underpaid tax three times what he could have earned if he put the money in a bank, he is economically prompted to pay the tax rather than withhold it. If he is subject to statutory penalties including fines and attachment, he is impelled to pay his taxes rather than risk further exposure.

Indeed, when there is an ostensibly available refund remedy at the time the taxes are paid,[7] not only are taxpayers prompted by the penalties but they are further enticed by the apparent ease and safety of the refund remedy to pay first and argue later. The very purpose of imposing penalties for underpayment and providing simple refund remedies for overpayment is to facilitate revenue collection efforts by prompting the payment of all taxes allegedly due before any challenge is initiated. *McKesson*, 496 U.S. at 37; *George Moore Ice Cream Co., Inc. v. Rose*, 289 U.S. 373, 379 (1993); E. Duffy, *J. Multistate Tax.*, "When Are Retroactive Refunds In State Litigation Available?", Vol. 2 (Mar.-Apr. 1992) 20, 20 & 24.

### C. The Essence of *Harper* and *McKesson*

After *Harper*, there can be no dispute as to the requirements of federal law: if a state does not provide taxpayers an adequate predeprivation remedy, then it must provide them "meaningful backward-looking relief." A state that imposes financial sanctions against taxpayers to prompt them to pay their taxes when due does not provide ade-

[7] *See, e.g.*, O.C.G.A. § 48-2-35 (Georgia refund statute); Va. Code Ann. §§ 58.1-1825 and 58.1-1826 (Virginia refund statutes).



quate predeprivation remedies. These commands devolve into two simple inquiries:

> Does the state provide a *definite* means, *discernible* by a reasonable taxpayer, for challenging the validity of a tax without first having to pay the tax or suffer some other deprivation?
>
> If there is such a remedy, does the state *guarantee* the taxpayer that if he pursues this route, he will be immune from all criminal and economic sanctions, including penalties, liens, seizures of property, and above market interest, regardless of whether he prevails?

## II. NEITHER GEORGIA NOR ANY OTHER STATE STILL INVOLVED IN *DAVIS* LITIGATION PROVIDES ADEQUATE PREDEPRIVATION REMEDIES

### A. Georgia Does Not Provide Constitutionally Adequate Predeprivation Relief

Under this Court's prior holdings, the Georgia statutory framework does not provide a clear and certain predeprivation remedy free of duress. The decision below does not pass the tests described in Part I.C., *supra*.

At the outset, none of the putative predeprivation remedies identified by the court below are true predeprivation remedies. The court below held that Petitioner could have sought declaratory and injunctive relief prior to paying his taxes. The answer to this, however, is that Petitioner and other federal retirees did seek such relief and their efforts were spurned. *See* Pet. Br. at 1F-2F; *Collins v. Waldron*, 259 Ga. at 582-83, 385 S.E.2d at 74-75. Thus, because these taxpayers were unable to secure this relief, it cannot be said that their entitlement to this relief was definite or certain.

The other putative predeprivation remedies are similarly flawed. Administrative review is unavailing to taxpayers challenging unconstitutional taxation because the admin-

istrative tribunal is "powerless" to provide relief. *Flint River Mills v. Henry*, 234 Ga. at 386, 216 S.E.2d at 896-97; *George v. Department of Natural Resources*, 250 Ga. at 492, 299 S.E.2d at 557. Because the affidavit of illegality route and the appeal from the notice of assessment route require the payment of tax or the posting of security, neither is a true predeprivation remedy. O.C.G.A. § 48-2-59(c).

Moreover, Georgia's remedial scheme as a whole is insufficiently clear because the rules are in constant flux. The state provided an ostensibly controlling statutory refund remedy, O.C.G.A. § 48-2-35:

> A taxpayer shall be refunded *any and all taxes* or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, . . .

(emphasis added). And, in related *Davis* litigation, the court below denied declaratory and injunctive relief to the retirees on the ground that the refund statute provided an adequate remedy at law. *Collins v. Waldron*, 259 Ga. at 583, 385 S.E.2d at 75 n.1. Nonetheless, in its initial decision in this case, the court below held that the refund statute applied only to taxes "erroneously or illegally assessed and collect[ed] . . . under a *valid* law," and not to taxes erroneously or illegally collected under invalid state laws. Pet. App. 8D (emphasis added). The court below then created a wholly unprecedented pay under protest requirement that blocked the *Davis* litigants from receiving any relief, even though there was no possible way that any Georgia citizen could have foreseen such a requirement at the time these taxes were due. Such judicial legerdemain transforms the tax landscape into quicksand, where seemingly firm ground slips away as soon as a taxpayer takes a step. Due Process demands that taxpayers be given more certain footing.



As described in detail in Part I of Petitioner's Brief, Georgia does not provide adequate predeprivation relief because it does not *guarantee* immunity from its statutory "'sanctions and summary remedies designed' to prompt taxpayers to 'tender . . . payment before their objections are entertained or resolved. . . .'"[8] These sanctions and summary remedies do not make the Georgia tax scheme invalid *per se*, but they do compel Georgia to provide meaningful backward-looking relief in addition to any other remedies it may offer.

Georgia imposes significant penalties on a taxpayer who unsuccessfully challenges a tax prior to payment. These penalties include above market rates of interest, financial sanctions, liens and criminal penalties. Georgia law makes nonpayment of taxes a misdemeanor crime, O.C.G.A. § 48-7-2[9] (no willfulness necessary), and subject to imprisonment if nonpayment is willful. O.C.G.A. § 48-7-127(c). There is no provision in Georgia law to exempt taxpayers from these statutes while a challenge is pending. Indeed, just the opposite is true because Georgia law imposes a duty on "all tax collectors, tax commissioners, sheriffs and constables to make sure that all persons violating any tax laws of [Georgia] are prosecuted for all such violations." O.C.G.A. § 48-2-81.

In addition to criminal penalties, Georgia imposes financial sanctions against a would-be prepayment challenger. An unsuccessful challenger is subject to a penalty of up to 25% of the tax, plus interest at the rate of 1% per month. O.C.G.A. §§ 48-7-86, 48-2-40. This interest rate is well above the market rate of interest. The cumulative effect of a 25% penalty and an above market interest rate since April 1989 means that Petitioner may have his tax nearly doubled if this case is not resolved in his favor.

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[8] *Harper*, 113 S. Ct. at 2519 n.10 (citations omitted).

[9] Relevant Georgia statutes are set out in Pet. App. G.

This risk is constitutionally significant duress. *Atchison*, 223 U.S. at 286.

Georgia has other procedures designed to prompt taxpayers to pay the tax prior to any challenge. Prepayment challengers are subject to garnishment, levy, attachment and liens. O.C.G.A. §§ 48-2-55, 48-2-56. Although these remedies are discretionary, there is no provision in Georgia law that automatically stays any of these summary remedies pending the outcome of a tax challenge. As this Court held in *Atchison*, a taxpayer cannot be forced to risk imposition of any of these penalties just to have his day in court. 223 U.S. at 286-87. *See also Hagge*, 504 N.W.2d at 451 (holding that because Iowa imposed penalties for nonpayment of taxes and created a statutory lien against delinquent taxpayers' property, the taxes were paid under duress and the state was thus constitutionally obligated to provide taxpayers a postdeprivation remedy); *Service Oil Inc.*, 479 N.W.2d at 821-22 (holding that the risk of imposition of penalties up to 5% of the tax due plus interest at the rate of one percent per month rendered North Dakota's provisions constitutionally inadequate). Because there is no guarantee that such summary collection remedies will be stayed during the pendency of a challenge, Georgia is constitutionally required to provide meaningful backward-looking relief.

### B. Virginia Does Not Provide Constitutionally Adequate Predeprivation Relief

On remand from this Court in *Harper*, the trial court held that declaratory relief is an available and adequate predeprivation remedy. *Harper*, Letter Opinion at 2. However, declaratory relief is anything but a *definite* means to secure prepayment relief; indeed, standing by itself, declaratory relief is only prospective relief, not predeprivation relief.

Declaratory relief for unconstitutional taxation is not "certain" in Virginia because a taxpayer has no entitlement to have his claim heard on the merits; *i.e.*, irrespective of the validity of his arguments, he may still be denied relief. This is so because jurisdiction in declaratory judgment actions is discretionary and indeed disfavored in tax cases:



> [W]hile the courts have reasonable discretion in determining whether to exercise jurisdiction in declaratory judgment proceedings, *cases involving questions of tax liability should be scrutinized with care* to the end that the due and orderly administration of the State's fiscal affairs be not unduly interfered with.

*Haughton v. Lankford*, 189 Va. 183, 198, 52 S.E. 2d 111, 117 (1949) (emphasis added). *See also Chaffinch v. Chesapeake & Potomac Tel. Co. of Va.*, 227 Va. 68, 72, 313 S.E. 2d 376, 378 (1984) (trial court has broad discretion to decline jurisdiction of declaratory judgment, especially where other remedies exist), *quoting American Nat. Bank v. Kushner*, 162 Va. 378, 386, 174 S.E. 777, 780 (1934); *Liberty Mutual Insurance Co. v. Bishop*, 211 Va. 414, 421, 177 S.E. 2d 519, 524 (1970) ("[T]he power to make a declaratory judgment is a discretionary one and must be exercised with care and caution. It will not as a rule be exercised where some other mode of proceeding is provided."). Because taxpayers have no *definite* entitlement to declaratory relief in tax cases, the declaratory judgment route in Virginia is too uncertain to be constitutionally adequate.

More fundamentally, Virginia's declaratory judgment action provides neither pre- nor post-deprivation relief. This is most aptly demonstrated in *Perkins v. Albemarle County*, 214 Va. 240, 198 S.E. 2d 626, *aff'd and modfied on reh'g*, 214 Va. 416, 200 S.E. 2d 566. *Perkins* is the extremely rare Virginia tax case where the taxpayer was able to secure a declaration that a taxing scheme was unconstitutional. Yet declaratory relief did not relieve the taxpayers of their obligation to pay the taxes during the pendency of the suit. Indeed, on rehearing, the Virginia

Supreme Court vacated its prior holding that the taxing authority had to *refund* the taxes paid. 214 Va. at 419, 200 S.E. 2d at 569. The fact that refunds were even at issue demonstrates that the taxpayers obtained no *pre*-deprivation relief. Thus, *Perkins* establishes that declaratory relief yields neither predeprivation relief nor post-deprivation relief, but instead only *prospective* relief. Prospective relief alone, however, does not satisfy the requirements of federal law. *McKesson*, 496 U.S. at 31.[10]

Moreover, a Virginia taxpayer who fails to pay taxes is subject to a variety of sanctions. Most significantly, the state imposes financial sanctions equal to a maximum of 30% of the tax due plus above market interest at the rate of 12% per annum. Va. Code Ann. §§ 58.1-351; 58.1-15.[11] Thus, a taxpayer who would have sought to pursue administrative remedies for 1988 taxes imposed on his federal annuity would now be facing a potential 90% increase in his liability if his challenge is unsuccessful. Indeed, this is precisely the approach taken by the Virginia Department of Taxation. *See Individual Income Tax Private Ruling Letter* (Va. Tax Comm. Aug. 24, 1989) (WESTLAW 1989 WL 266209) (refusing to waive penalty and interest assessed against federal retiree who did not pay income tax on his 1988 federal pension). This is constitutionally significant duress under *Atchison* and, accordingly, Due Process requires Virginia to provide a meaningful backward-looking remedy.

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[10] It is indeed ironic that Virginia would contend that the appropriate means to challenge the constitutionality of a tax is to refuse to pay that tax and seek a declaratory judgment. This argument would render the anti-injunction provision of § 58.1-1831 meaningless: a taxpayer would never need an injunction to restrain the assessment or collection of any tax. Rather, he could merely refuse to pay the tax. This, however, would impermissibly "permit one aggrieved by an assessment to nullify the statutory method of procedure." *Todd v. County of Elizabeth City*, 191 Va. 52, 60 S.E. 2d 23, 25 (1950).

[11] The relevant state statutes are located in Appendices B-F.



Under § 58.1-1805, irrespective of whether the taxpayer may have filed an application for correction of the assessment, the Tax Commissioner may file a memorandum of lien at any time beyond thirty days after taxes, penalties and interest become due. This lien on the taxpayer's property is itself a constitutionally cognizable deprivation. *See Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 85 (1988) ("[T]he lien encumbered the property and impaired appellant's ability to mortgage or alienate it; and state procedures for creating and enforcing such liens are subject to the strictures of due process."). The threat of a lien is yet another form of duress which prompts payment of the tax.

Despite its success on remand to the trial court, Virginia is wrong in its assertion that Virginia has adequate predeprivation procedures. The sanctions and penalties outlined above apply notwithstanding the putative ability to bring a prepayment challenge to the validity of a tax. That is constitutionally significant duress.

### C. New York Does Not Provide Constitutionally Adequate Predeprivation Relief

New York does not have even the semblance of a predeprivation remedy. Instead, taxpayers in New York are required to pay the tax as a condition precedent to challenging the validity of the tax. *In the Matter of the Petition of Donal A. Meyers*, N.Y. Tax Rep. ¶ 401-124 (CCH) (Tax App. Tribunal, June 3, 1993) (penalties for failure to prepay income tax are summarily assessed). Consistent with existing New York law, the *Davis* litigants in New York were required to pay their taxes prior to litigating their challenge. Accordingly, New York fails the first aspect of the test described in Part I.C., *supra*.

In addition, the state may issue a warrant for the collection of a tax at any time that it believes the collection of a tax is in jeopardy. N.Y. Tax Law § 692(c) (McKinney 1993). This warrant entitles the state to levy and sell the taxpayer's real and personal property. *Id.*

Furthermore, New York law expressly authorizes the state to issue an assessment and warrant "notwithstanding that an application for judicial review in respect of such deficiency has been duly made by the taxpayer. . . ." N.Y. Tax Law § 690(c). The only way a taxpayer can escape is to pay the tax or to post a bond equal to the tax plus interest and penalties. *Id.*

As in Georgia and Virginia, declaratory and injunctive relief were neither available nor adequate remedies. Recognizing the purely prospective nature of declaratory relief, New York suggested that the taxpayers should have commenced a declaratory judgment action several months before they were retired and subject to the tax, *i.e.*, before they had standing to challenge the tax. Not only was injunctive relief unavailable because there was an existing remedy at law in the form of New York's refund statute (N.Y. Tax Law § 686), any taxpayer who sought an injunction and lost risked being subject to the penalties described above. Accordingly, New York law does not provide sufficient predeprivation relief, free of duress, to escape the constitutional requirement of a postdeprivation remedy.

**D. Kansas Does Not Provide Constitutionally Adequate Predeprivation Relief**

Like Georgia, Virginia and New York, Kansas imposes significant penalties on a taxpayer who chooses to challenge a tax prior to payment.

Kansas imposes financial penalties equal to 25% of the tax plus an above market interest rate of 18% per year. Kans. Stat. Ann. §§ 79-3228(b); 79-2968(a). In the nearly five years that this litigation has been pending, a taxpayer who withheld payment and lost a challenge would face paying the tax plus approximately 115% of the tax as a penalty. That is constitutionally significant duress. *Atchison*, 223 U.S. at 286.

In addition, the Kansas Secretary of Revenue may issue a warrant 60 days after the tax becomes due "commanding the sheriff to levy upon and sell the real and personal property of the taxpayer . . . for the payment of the amount thereof, with the added penalties, interest and the cost of executing the warrant. . . ." Kan. Stat. Ann. § 79-3235. Whether or not the warrant is executed, it is filed and becomes a "lien upon the title to and interest in the real property of the taxpayer. . . ." *Id.* Such a lien, standing alone, is a constitutionally significant deprivation of property. *Peralta*, 485 U.S. at 85.



As in the other states, injunctive relief was not available. Kansas law allows tax collection to be enjoined only where there is fraud, corruption or lack of *state* statutory authority. *Mobil Oil Corp. v. McHenry*, 200 Kan. 211, 234, 436 P.2d 982 (1968); *J. Enterprises, Inc. v. Board of Harvey County Comm'rs*, 253 Kan. 552, 557-60, 857 P.2d 666 (1993). Kansas successfully argued within the context of the *Davis* litigation itself that injunctive relief was not available because the taxes were collected pursuant to duly enacted statutes, and were therefore not subject to be enjoined on the basis of fraud, corruption, or lack of state statutory authority. *Barker v. Kansas*, 89-CV-666 and 89-CV-1100 (Dist. Ct. Shawnee County, Kansas, Memorandum Decision and Order, January 28, 1994) (denying the request of federal retirees for injunctive relief against a tax the court had already struck down).

Kansas also resembles the other states in that collection efforts and financial penalties may proceed during the pendency of a challenge. Kan. Stat. Ann. §§ 60-907(a); 60-1701 *et seq.* In addition, a warrant would ordinarily be filed before the taxpayer receives notice or opportunity to be heard on the matter, and the automatic lien created therein is itself a deprivation. *Peralta*, 485 U.S. at 85.

In sum, Kansas has created a statutory framework which does not provide sufficient predeprivation relief, free of duress, to escape the constitutional requirement of a postdeprivation remedy.

### E. Wisconsin Does Not Provide Constitutionally Adequate Predeprivation Relief

Like Georgia, Virginia, New York and Kansas, Wisconsin imposes significant penalties on taxpayers who would seek to challenge a tax prior to payment.[12]

Wisconsin imposes, *inter alia*, interest on delinquent taxes at the rate of 18% per year. Wis. Stat. § 71.82(2). The statutory scheme also provides for a range of penalties equal to 25% of the tax. *See* Wis. Stat. § 71.83 (enumerating several different penalties). Moreover, an objective good faith belief that a tax is unconstitutional is no defense to the imposition of such penalties. *See, e.g., Hennick v. Wisconsin Dept. of Revenue,* [1986-1990 Transfer Binder—New Matters] Wis. Tax Rep. ¶ 203-095 (CCH) (Wis. Tax Appeals Comm'n. Oct. 12, 1989). Wisconsin law also imposes a Delinquent Tax Collection Fee. This fee is equal to the greater of $25 or 4½% of the total amount of the tax, interest and penalty remaining unpaid. 78 Wisconsin Tax Bulletin 1 (July 1992).

In addition, any unpaid tax liability results in the automatic perfection of a lien on all of the taxpayer's property. Wis. Stat. § 71.91(4). Wisconsin law also authorizes the Department of Revenue to issue warrants for the levy and execution upon the property of any taxpayer to satisfy any unpaid overdue tax. Wis. Stat. § 71.91(5).[13]

At bottom, Wisconsin has created a comprehensive statutory scheme that "prompts" taxpayers to pay their taxes before their challenges are entertained.

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[12] Declaratory and injunctive relief are unavailable in Wisconsin. *Hogan v. Musolf*, 163 Wis. 2d 1, 26, 471 N.W.2d 216 (1991), *cert. den.*, 112 S. Ct. 867 (1992) ("[I]n tax matters, [i]njunctive relief is not a substitute for the administrative remedy . . . ." (citations omitted)).

[13] In addition to the comprehensive scheme of civil sanctions, Wisconsin vigorously pursues criminal sanctions. *See, e.g., Criminal Enforcement Activities*, 76 Wisconsin Tax Bulletin 3 (April 1992).



### F. Arizona Does Not Provide Constitutionally Adequate Predeprivation Relief

Arizona imposes both civil and criminal penalties to prompt payment of its taxes prior to a challenge. Among other sanctions, Arizona imposes financial penalties and above market interest for overdue taxes. Ariz. Rev. Stat. Ann. §§ 42-134 and 42-136. Arizona law also prohibits injunctions which interfere with the collection of its taxes. Ariz. Rev. Stat. Ann. § 42-124(B)(1). Criminal sanctions are also imposed. Ariz. Rev. Stat. Ann. § 42-137. Whatever remedies the state now claims exist, identifiable only through hindsight, Arizona law places its taxpayers at a " 'serious disadvantage' ". *McKesson*, 496 U.S. at 38 n.21. (citations omitted).

Arizona's own courts have recognized the coercive design of its statutory tax scheme:

> These principles have pointed application to this tax statute in which obedience to the Act is exacted by authorizing punishment and penalties, and by such coercive measures as being adjudged a criminal and subjected to a fine or imprisonment, . . .; having to pay a penalty of twenty percent added to the tax. . . .

*Duhame v. State Tax Comm'n*, 65 Ariz. 268, 179 P.2d 252, 255 (1947). Accordingly, it is undisputed that Arizona taxpayers are prompted to pay first, and challenge later.

## CONCLUSION

For the foregoing reasons, the decision of the court below is unsustainable. Georgia does not provide definite and ascertainable routes for taxpayers to challenge taxation before payment. All the routes the court below identified as putative predeprivation remedies are flawed: either they are not true predeprivation remedies, or, because they are encumbered by penalties and sanctions, they are not meaningful or adequate remedies. This Court should reverse the court below and, in so doing, bring an end to the war of attrition many states are waging

against citizens who dedicated their working lives to service to this Nation.

Respectfully submitted,

MICHAEL J. KATOR *
STEPHEN Z. CHERTKOF
KATOR, SCOTT & HELLER
1275 K Street, N.W.
Suite 950
Washington, D.C. 20005-4006
(202) 898-4800

ROBERT COSTELLO
GIVNEY, ANTHONY & FLAHERTY, P.C.
665 5th Avenue
Second Floor
New York, New York 10022
(212) 688-5151

MARK L. WEYMAN
ROBERTO VELEZ
ANDERSON, KILL, OLICK & OSHINSKY, P.C.
666 Third Avenue
New York, New York 10017
(212) 850-9363

JOHN J. PHELAN, III
JOHN J. PHELAN, III, P.C.
1414 Avenue of the Americas
New York, New York 10019
(212) 688-8088

KENTON C. GRANGER
RAYMOND L. DAHLBERT
NIEWALD, WALDECK & BROWN, P.C.
9401 Indian Creek Parkway
Corporate Woods, Bldg. 40
Suite 550
Overland Park, KS 66225
(913) 451-1717

EUGENE O. DUFFY
O'NEIL, CANNON & HOLLMAN, S.C.
Suite 1400
111 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 276-5000

JOHN C. FRIEDEN
KEVIN M. FOWLER
FRIEDEN, HAYNES & FORBES
400 S.W. 8th, Suite 409
Topeka, KS 66603
(913) 232-7266

BRIAN A. LUSCHER
BONN, LUSCHER, PADDEN & WILKINS, CHARTERED
805 N. Second Street
Phoenix, AZ 85004
(602) 254-5557

* Counsel of Record

April 15, 1994

# APPENDICES

## APPENDIX A

The following is a complete list of organizations and individuals appearing as amicus curiae in connection with this brief:

### MEMBERS OF THE MILITARY COALITION

### THE RETIRED OFFICERS ASSOCIATION (TROA)

The Retired Officers Association was founded in 1929 and has approximately 395,000 members. Membership in the Association is open to all past and present, active, reserve and retired commissioned and warrant officers in any of the seven uniformed services. The organization's mission is to support strong national defense and to represent membership on retirement and benefit issues before Congress.

### AIR FORCE ASSOCIATION (AFA)

The Air Force Association was founded in 1946 and has approximately 200,000 members. Membership is open to anyone who has served in the U.S. armed forces. Other American citizens may affiliate as patrons. The organization's mission is to promote public understanding of aerospace issues and national security requirements to ensure strong support of the nation's defense and the men and women who serve in the U.S. Air Force.

### AIR FORCE SERGEANTS ASSOCIATION (AFSA)

The Air Force Sergeants Association was founded in 1961. It has approximately 165,000 members and is composed of active and retired enlisted personnel in the Air Force, Air National Guard, Air Force Reserve, Army Air Corps and Army Air Force. Its members belong to 198 chapters throughout the world and the purpose of the organization is to serve as the voice of Air Force enlisted service members.

## ASSOCIATION OF MILITARY SURGEONS OF THE UNITED STATES (AMSUS)

The Association of Military Surgeons of the United States received its Congressional Charter in 1908. Its membership consists of 17,000 members and is open to all past and present commissioned officers or GS-9 and above civilians in the medical services of the United States Air Force, the United States Air Force Reserve, the United States Army, the United States Army Reserve, the Air National Guard, the Army National Guard, the United States Public Health Service and the Veterans' Administration; officers of military medical services of other nations; and past and present medical consultants to the chiefs of the federal medical services. The purpose of the Association is to improve the nation's federal health care system.

## ASSOCIATION OF U.S. ARMY (AUSA)

The Association of U.S. Army was founded in 1950 and has approximately 135,000 individual and 250 industrial members. Membership is open to all active, reserve and civilian personnel in the Army, and any person subscribing to the association's bylaws. The purpose of the organization is to foster public understanding and support of the Army and the people who serve in it.

## CHIEF WARRANT AND WARRANT OFFICERS ASSOCIATION, U.S. COAST GUARD (CW & WOA)

The Chief Warrant and Warrant Officer's Association was founded in 1929 and has approximately 3,300 members. Membership is open to active duty, reserve and retired Coast Guard warrant and chief warrant officers. The association's purpose is to advance members' professional abilities.



## COMMISSIONED OFFICERS ASSOCIATION OF THE U.S. PUBLIC HEALTH SERVICE, INC. (COA)

The Commissioned Officers Association of the U.S. Public Health Service was founded in 1937 and has approximately 7,500 members. Membership is open to active duty, retired, inactive reserve and former commissioned officers of the U.S. Public Health Service. The purpose of the organization is to ensure that the interests and welfare of commissioned officers of the USPHS are protected.

## ENLISTED ASSOCIATION OF THE NATIONAL GUARD OF THE U.S. (EANGUS)

The Enlisted Association of the National Guard of the U.S. was founded in 1962 and has approximately 67,000 members. Membership is open to enlisted members of the National Guard through state associations and associate membership is open to all individuals through state associations. The purpose of the association is to promote and maintain adequate national security; and to foster the status, welfare and professionalism of enlisted members of the National Guard.

## FLEET RESERVE ASSOCIATION (FRA)

The Fleet Reserve Association was founded in 1922. It has approximately 170,000 members who are active duty, retired enlisted personnel and commissioned officers with prior service in the Navy, Marine Corps and Coast Guard. The Association is chartered under the laws of Pennsylvania and its purpose is to represent its members on military personnel legislative matters before Congress.

## MARINE CORPS LEAGUE (MCL)

The Marine Corps League was founded in 1923 and has approximately 40,000 members. Membership is open to those who served in the Marine Corps. The organiza-

tion's mission is to preserve the traditions, to promote the interests of the Marine Corps, to voluntarily aid and render assistance to all Marines and former Marines, as well as to their widows and orphans.

## MARINE CORPS RESERVE OFFICERS ASSOCIATION (MCROA)

The Marine Corps Reserve Officers Association was founded in 1928 and has approximately 5,700 members. Membership is open to all Marine officers and officers of other U.S. services who served with Marines. The association's mission is to support and strengthen the Marine Corps, its reserve and reserve officers.

## NATIONAL ASSOCIATION FOR UNIFORMED SERVICES/SOCIETY OF MILITARY WIDOWS (NAUS/SMW)

The National Association for Uniformed Services/ Society of Military Widows was founded in 1968 and has approximately 155,000 members. NAUS/SWM membership is open to all active, retired and former members of the uniformed services, their families and survivors. The association's mission is to represent members' interests by supporting legislation that upholds the security of the United States, sustains the morale of the uniformed services and provides fair and equitable consideration for all.

## NATIONAL GUARD ASSOCIATION OF THE UNITED STATES (NGAUS)

The National Guard Association of the U.S. was founded in 1878 and has approximately 54,000 members. Membership is open to all present and former officers of the Army and Air National Guard, corporate and individual associate membership. The association's mission is to improve the readiness of the National Guard and to provide personnel benefits and entitlements for the half million members of the National Guard.



## NATIONAL MILITARY FAMILY ASSOCIATION (NMFA)

The National Military Family Association was founded in 1969 and has approximately 10,000 members. Membership is open to active duty, retired and reserve component members of the seven uniformed services and their family members. The association's mission is to serve as an advocate for uniformed service families and to educate and inform them concerning issues affecting their lives.

## NAVAL ENLISTED RESERVE ASSOCIATION (NERA)

The Naval Enlisted Reserve Association was founded in 1957. It has 15,000 members and its membership is open to active, inactive, and retired enlisted reservists in the Navy, Marine Corps and Coast Guard. The association's mission is to focus on members' interests, morale and well-being, and readiness and training of sea service reserve forces.

## NAVAL RESERVE ASSOCIATION (NRA)

The Naval Reserve Association was founded in 1954 and consists of 25,000 members. Membership in the Naval Reserve Association is open to active, inactive and retired Naval Reserve officers and its purpose is to maintain and strengthen the nation's defense by ensuring a continued strong Navy and Naval Reserve.

## NAVY LEAGUE OF THE UNITED STATES (NLUS)

The Navy League of the United States was founded in 1902 and has approximately 68,000 members. Membership is open to civilians, military reservists and retirees. The league's mission is to maintain a strong U.S. maritime posture through support of the Navy, Marine Corps, Coast Guard and Merchant Marine.

## NON COMMISSIONED OFFICERS ASSOCIATION OF THE UNITED STATES (NOCA)

The Non Commissioned Officers Association of the United States is a patriotic, civic and fraternal organization operating under Texas Corporate Charter. The Association was founded in 1960 and has more than 160,000 members. Its membership consists of active, reserve, retired or veterans of the United States armed forces in the grades E-4 thru E-9. The purpose of the Association is to promote and protect the rights and benefits of active duty and veteran non commissioned officers and petty officers in all five branches of the armed forces and provide opportunities for them to join in patriotic, fraternal, social and benevolent activities.

## RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES (ROA)

The Reserve Officers Association of the United States was organized in 1922, and chartered by Congress in June 1950. Originally, the Reserve Officers Association consisted solely of Army Officers, Reserve Officers, National Guard Officers, and Retired Officers. Following World War II, the Reserve Officers Association expanded its membership to all services and it now has approximately 100,000 members. The purpose of the association is to ensure an adequate total force of all services including both active and reserve components, and a force that is mobilization ready to meet any contingency.

## THE JEWISH WAR VETERANS OF THE UNITED STATES OF AMERICA (JWV)

The Jewish War Veterans of the United States was founded in 1896 and has approximately 100,000 members. Membership is open to veterans of war time service of the Jewish faith. The organization's mission is service to veterans, Americanism, and to provide a voice on the Hill for veterans' legislation and benefits.



## THE MILITARY CHAPLAINS ASSOCIATION (MCA)

The Military Chaplains Association was founded in 1925 and chartered by the 81st Congress in 1950. It has approximately 1,300 members. Membership is open to all chaplains of the Army, Navy, Air Force, VA and Civil Air Patrol, active duty, reserve, retired and former. The organization's mission is to safeguard and strengthen the forces of faith and morality of our nation; to perpetuate and to deepen the bonds of understanding and friendship in our military services; to preserve spiritual influence and interest in all members and veterans of the armed forces; to uphold the Constitution of the United States; and to promote justice, peace and goodwill.

## THE RETIRED ENLISTED ASSOCIATION (TREA)

The Retired Enlisted Association was founded in 1968 and consists of 68,000 members. Its membership is made up of enlisted retirees from all branches of the armed services and their surviving spouses. The mission of the association is to represent retired enlisted personnel and protect retiree military benefits.

## U.S. ARMY WARRANT OFFICERS ASSOCIATION (USAWOA)

The U.S. Army Warrant Officers Association was founded in 1973 and has 9,000 members. Its members consist of National Guard active duty, reserve and retired Army warrant officers. The purpose of the association is to recommend improvement of the Army, and promote technical and professional information among warrant officers.

## U.S. COAST GUARD CHIEF PETTY OFFICERS ASSOCIATION (CPOA)

The U.S. Coast Guard Chief Petty Officers Association was founded in 1969. Its 11,600 members are active, retired, and reserve Coast Guard chief petty officers. The mission of the association is to promote the welfare of chief petty officers, to promote and protect the rights and

benefits of all armed forces personnel and aid in Coast Guard recruiting.

## ARIZONA

The litigants are the Estate of John L. Bohn, Shirley Bohn, Donald and Mary Rutan, Carl Linton, Arthur Abbott, who are retired federal employees, their estates or personal representatives, and, under the doctrine of virtual representation, the class of approximately 65,000 other retired federal employees, their estates and personal representatives. *Bohn v. Waddell*, No. 1 (A-TX, 94 — — (Ariz. Ct. App.) (Bohn II).

## KANSAS *AMICI*

The petitioners in *Barker v. Kansas*, 112 S.Ct. 1619 (1992), *on remand*, Nos. 89-CV-666 and 89-CV-1100 (Dist Ct. Shawnee Cty., Kan., Div. IV), include:

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|---|---|
| KEYTON BARKER; | MARJORIE E. LOBER; |
| ROBERT W. CLAY; | ROGER J. OLSON; |
| BETTY J. CLAY; | NANCY W. OLSON; |
| ANTHONY E. CORCORAN; | ANDREW J. PEELE; |
| LELAND W. KEISTER, JR.; | JOHN G. FOWLER; |
| WILLIAM RICHARDS, SR.; | OLLUN E. RICHARDS; |
| PATRICIA K. KEISTER; | LONETA S. WILLIAMS; |
| LEONARD W. WILLIAMS; | EDWARD F. KELLOGG; |
| RENATA O. KELLOGG; | CLARENCE WOLF; and |
| WILLIAM J. LOBER, JR.; | FLORA B. WOLF, |

for themselves individually and as designated class representatives on behalf of a certified class of approximately 14,000 federal military retirees (and joint taxpayer spouses where applicable) who were subject to Kansas income taxation of federal military retired pay during one or more years from 1984 through 1991.

## NEW YORK *AMICI*

The appellants in *Duffy v. Wetzler*, 555 N.Y.S.2d 543 (N.Y. Sup. Ct. 1990), *aff'd as modified*, 174 A.D.2d 253, 579 N.Y.S.2d (N.Y. App. Div.), *appeal dism'd*, 79 N.Y. 2d 976, 583 N.Y.S.2d 190, 592 N.E.2d 798 (N.Y. 1992), *cert. granted, vacated, and remanded*, 113 S.Ct.



3027 (1993), *on remand*, Nos. 90-07800 and 91-02056 (N.Y. Sup. Ct.), include:

| | |
|---|---|
| EUGENE H. DUFFY; | FERNANDO S. MAURA; |
| ALICE G. DUFFY; | JAMES SWEEZY; |
| | ALICE SWEEZY; |

on behalf of themselves and all others similarly situated.

## VIRGINIA *AMICI*

The plaintiffs in *McClelland v. Payne*, No. 3:94CV211 (E.D.Va, Richmond Division), include:

JOHN F. MCCLELLAND;
THOMAS B. WORSLEY; and
CHRISTOPHER J. GIAIMO,

for themselves individually for all other similarly situated, as representatives on behalf of a putative class of approximately 185,000 similarly situated civilian and military annuitants of the federal government whose federal pensions were subject to taxation by Virginia.

## WISCONSIN *AMICI*

J. Gerard Hogan, on behalf of himself and as representative of the certified taxpayer class in *Wisconsin Department of Revenue v. Hogan*, No. 93-CV-2549 *et al., pet. for rev. pend'g*, Cir. Ct. Dane Cty.

## APPENDIX B

### Kan. Stat. Ann. § 79-3228 (1989)
### Penalty & Interest for Underpayments

79-3228. Penalties and interest. (a) If any taxpayer, without intent to evade the tax imposed by this act, shall fail to file a return or pay the tax, if one is due, at the time required by or under the provisions of this act, but shall voluntarily file a correct return of income or pay the tax due within 60 days thereafter, there shall be added to the tax an additional amount equal to 10% of the unpaid balance of tax due plus interest at the rate prescribed by subsection (a) of K.S.A. 79-2968, and amendments thereto, from the date the tax was due until paid.

(b) If any taxpayer fails voluntarily to file a return or pay the tax, if one is due, within 60 days after the time required by or under the provisions of this act, there shall be added to the tax an additional amount equal to 25% of the unpaid balance of tax due plus interest at the rate prescribed by subsection (a) of K.S.A. 79-2968, and amendments thereto, from the date the tax was due until paid.

(c) If any taxpayer who has failed to file a return or has filed an incorrect or insufficient return, and after notice from the director refuses or neglects within 20 days to file a proper return, the director shall determine the income of such taxpayer according to the best available information and assess the tax together with a penalty of 50% of the unpaid balance of tax due plus interest at the rate prescribed by subsection (a) of K.S.A. 79-2968, and amendments thereto, from the date the tax was originally due to the date of payment.

(d) Any person, who with fraudulent intent, fails to pay any tax or to make, render or sign any return, or to supply any information, within the time required by or under the provisions of this act, shall be assessed a penalty equal to the amount of the unpaid balance of tax due



plus interest at the rate prescribed by subsection (a) of K.S.A. 79-2968, and amendments thereto, from the date the tax was originally due to the date of payment. Such person shall also be guilty of a misdemeanor and shall, upon conviction, be fined not more than $1,000 or be imprisoned in the county jail not less than 30 days nor more than one year, or both such fine and imprisonment.

(e) Any person who willfully signs a fraudulent return shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment for a term not exceeding five years. The term "person" as used in this section includes any agent of the taxpayer, and officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs.

(f) Whenever, in the judgment of the secretary or the secretary's designee, the failure of the taxpayer to comply with the provisions of subsections (a), (b) and (c) of this section, was due to reasonable causes, the secretary or the secretary's designee may waive or reduce any of the penalties upon making a record of the reasons therefor.

(g) In case of a nonresident or any officer or employee of a corporation, the failure to do any act required by or under the provisions of this act shall be deemed an act committed in part at the office of the director.

(h) In the case of a nonresident individual, partnership or corporation, the failure to do any act required by or under the provision of this act shall prohibit such nonresident from being awarded any contract for construction, reconstruction or maintenance or for the sale of materials and supplies to the state of Kansas or any political subdivision thereof until such time as such nonresident has fully complied with this act.

79.3229. Jeopardy assessments, when; procedures; closing of taxable period. Whenever the director of taxa-

tion has reason to believe that a taxpayer liable for tax under any provisions of article 32 of chapter 79 of the Kansas Statutes Annotated is about to depart from the state or to remove such taxpayer's property therefrom, or to conceal oneself or such taxpayer's property therein, or to do any other act tending to prejudice, jeopardize or render wholly or partly ineffectual the collection of such tax unless proceedings are brought without delay, the director shall immediately make an assessment for all such taxes due from such taxpayer, noting such finding on the assessment. Thereupon a warrant shall be issued for the collection of the tax as provided in K.S.A. 79-3235 and amendments thereto. The taxpayer may within 15 days from the date of filing of such warrant request a hearing by the director on the correctness of the jeopardy assessment. If the director finds that in certain cases, collection of the tax for the current year will be jeopardized by delay, the director may, in the exercise of discretion, declare the taxable period closed, and immediately issue notice and demand for payment of the tax found to be due. In such cases, collection may be stayed by giving such security as the director may consider adequate.

Orders under this section shall be rendered in accordance with the procedures for emergency adjudicative proceedings contained in K.S.A. 77-536 and amendments thereto. Hearings required under this section shall be conducted in accordance with the provisions of the Kansas administrative procedure act.

**Kan. Stat. Ann. § 79-2968 (1989)**
**18% Underpayment Interest Rate**

79-2968. Rate of interest on delinquent or unpaid taxes. Except as otherwise specifically provided by law, whenever interest is charged under any law of this state upon any delinquent or unpaid taxes levied or imposed by the state of Kansas or any taxing subdivision thereof the rate thereof shall be: (a) One and one-half percent



per month if computed monthly; and (b) eighteen percent per annum if computed annually.

**Kan. Stat. Ann. § 3235 (1989)**
**Summary Remedies/Distraint**

79-3235. Collection of delinquent taxes; tax lien. If any tax imposed by this act or any portion of such tax is not paid within 60 days after it becomes due, the secretary or the secretary's designee shall issue a warrant under the secretary's or the secretary's designee's hand and official seal, directed to the sheriff of any county of the state, commanding the sheriff to levy upon and sell the real and personal property of the taxpayer found within the sheriff's county for the payment of the amount thereof, with the added penalties, interest and the cost of executing the warrant and to return the warrant to the secretary or the secretary's designee and pay to the secretary or the secretary's designee the money collected by virtue of it not more than 60 days from the date of the warrant. The sheriff, within five days after the receipt of the warrant, shall file with the clerk of the district court of the county a copy thereof, and thereupon the clerk shall either enter in the appearance docket the name of the taxpayer mentioned in the warrant, the amount of the tax or portion of it, interest and penalties for which the warrant is issued and the date such copy is filed and note the taxpayer's name in the general index. No fee shall be charged for either entry. The amount of such warrant so docketed shall thereupon become a lien upon the title to and interest in the real property of the taxpayer against whom it is issued. The sheriff shall proceed in the same manner and with the same effect as prescribed by law with respect to executions issued against property upon judgments of a court of record and shall be entitled to the same fees for services to be collected in the same manner.

The court in which the warrant is docketed shall have jurisdiction over all subsequent proceedings as fully as

though a judgment had been rendered in the court. In the discretion of the secretary or the secretary's designee a warrant of like terms, force and effect may be issued and directed to any officer or employee of the secretary, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, and the subsequent proceedings thereunder shall be the same as provided where the warrant is issued directly to the sheriff. The taxpayer shall have the right to redeem the real estate within a period of 18 months from the date of such sale. If a warrant is returned, unsatisfied in full, the secretary or the secretary's designee shall have the same remedies to enforce the claim for taxes as if the state of Kansas had recovered judgment against the taxpayer for the amount of the tax. No law exempting any goods and chattels, lands and tenements from forced sale under execution shall apply to a levy and sale under any such warrant or upon any execution issued upon any judgment rendered in any action for income taxes. The secretary or the secretary's designee shall have the right at any time after a warrant has been returned unsatisfied or satisfied only in part, to issue alias warrants until the full amount of the tax is collected.

**Kan. Stat. Ann. § 79-32,107 (Supp. 1993)**
**Penalties & Interest for Estimated Tax Underpayments**

79-82,107. Penalties and interest for noncompliance, when same not imposed for underpayments; failure of employer to deduct and withhold; failure to collect, account for and pay tax; attempts to evade or defeat tax. (a) All penalties and interest proscribed by K.S.A. 79-3068, and amendments thereto, for noncompliance with the income tax laws of Kansas shall be applicable for noncompliance with the provisions of the Kansas withholding and declaration of estimated tax not relating to withholding tax which shall be enforced in the same manner as the "Kansas income tax act." A penalty at the same rate per annum prescribed by subsection (h) of K.S.A.



79-2968, and amendments thereto, for interest upon delinquent or unpaid taxes shall be applied and added to a taxpayer's amount of underpayment of estimated tax due from the date the estimated tax payment was due until the same is paid or until the 15th day of the fourth month following the close of the taxable year for which such estimated tax is a credit, whichever date is earlier, but such penalty shall not be added if the total amount thereof does not exceed $1. For purposes of this subsection, the amount of underpayment of estimated tax shall be the excess of the amount of the installment which would be required to be paid if the estimated tax were equal to 90% of the tax shown on the return for the taxable year or, if no return was filed, 90% of the tax for such year, over the amount, if any, of the installment paid on or before the last date prescribed for payment. Amounts due from any employer on account of withholding or from any taxpayer for estimated tax may be collected by the director in the manner provided for the collection of state income tax in K.S.A. 79-3235, and amendments thereto.

(b) No penalty or interest shall be imposed upon any individual with respect to any underpayment of any installment if the total amount of all payments of estimated tax made on or before the last date prescribed for the payment of such installment equals or exceeds the amount which would have been required to be paid on or before such date if the estimated tax were whichever of the following is the least:

(1) The tax shown on the return of the individual for the preceding taxable year, if a return showing a liability for tax was filed by the individual for the preceding taxable year and such preceding year was a taxable year of 12 months;

(2) an amount equal to 66⅔%, in the case of individuals referred to in subsection (b) of K.S.A. 79-32,102, and amendments thereto, and 90%, in the case of

all other individuals, of the tax for the taxable year computed by placing on an annualized basis, pursuant to rules and regulations adopted by the secretary of revenue, the taxable income for the months in the taxable year ending before the month in which the installment is required to be made.

(c) No penalty or interest shall be imposed upon any corporation with respect to any underpayment of any installment of estimated tax if the total amount of all payments of estimated tax made on or before the last date prescribed for the payment of such installment equals or exceeds the amount which would have been required to be paid on or before such date if the estimated tax were whichever of the following is the least:

(1) The tax shown on the return of the corporation for the preceding taxable year, if a return showing a liability for tax was filed by the corporation for the preceding taxable year and such preceding year was a taxable year of 12 months; or

(2)(A) an amount equal to 90% of the tax for the taxable year computed by placing on an annualized basis the taxable income; (i) For the first three months of the taxable year, in the case of the installment required to be paid in the fourth month; (ii) for the first three months or for the first five months of the taxable year, in the case of the installment required to be paid in the sixth month; (iii) for the first six months or for the first eight months of the taxable year in the case of the installment required to be paid in the ninth month; and (iv) for the first nine months or for the first 11 months of the taxable year, in the case of the installment required to be paid in the 12th month of the taxable year.

(B) For purposes of this subsection (2), the taxable income shall be placed on an annualized basis by (i) multiplying by 12 the taxable income referred to in subsection (2)(A), and (ii) dividing the resulting amount by the number of months in the taxable year (three, five,



six, eight, nine, or 11, as the case may be) referred to in subsection (2)(A).

(d) If the employer, in violation of the provisions of this act, fails to deduct and withhold under this chapter, and thereafter the tax against which such withholding may be credited is paid, the amount otherwise required to be deducted and withheld shall not be collected from the employer; but this subsection shall in no case relieve the employer from liability for any penalties or additions to the tax otherwise applicable in respect of such failure to deduct and withhold.

(e) Any person required to collect, truthfully account for, and pay over any tax imposed by this act, who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall in addition to the other penalties of this section be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

(f) In case of failure by any employer required by subsection (b) of K.S.A. 79-3298, and amendments thereto, to remit any amount of withheld taxes by the date prescribed therefor, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be imposed upon such person a penalty of 15% of the amount of the underpayment. For purposes of this subsection, the term "underpayment" means the excess of the amount of the tax required to be withheld and remitted over the amount, if any, remitted on or before the date prescribed therefor. The failure to remit for any withholding period shall be deemed not to continue beyond the last date prescribed for filing the annual return as required by subsection (d) of K.S.A. 79-3298, and amendments thereto. Penalty and interest as prescribed by K.S.A. 79-3228, and amendments thereto, shall not begin to accrue under subsection (a)

of this section on the amount of any such underpayment until the due date of the annual return for the calendar year in which such failure to remit occurs.



## APPENDIX C

### N.Y. Tax Law § 607(a) (McKinney 1987)

**§ 607. Meaning of terms.**

(a) General. Any term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes unless a different meaning is clearly required but such meaning shall be subject to the exceptions or modifications prescribed in the article or by statute. Any reference in this article to the laws of the United States shall mean the provisions of the internal revenue code of nineteen hundred eighty-six (unless a reference to the internal revenue code of nineteen hundred fiftyfour is clearly intended), and amendments thereto, and other provisions of the law of the United States relating to federal income taxes, as the same may be or become effective at any time or from time to time for the taxable year.

### N.Y. Tax Law § 659 (McKinney 1987)

**§ 659. Report of federal changes, corrections or disallowances**

If the amount of a taxpayer's federal taxable income, federal items of tax preference, total taxable amount or ordinary income portion of a lump sum distribution or includible gain of a trust reported on his federal income tax return for any taxable year, or the amount of a taxpayer's credit for employment-related expenses set forth on such return, or the amount of any federal foreign tax credit affecting the calculation of the credit for Canadian provincial taxes under section six hundred twenty or six hundred twenty-A, is changed or corrected by the United States internal revenue service or other competent authority or as the result of a renegotiation of a contract or subcontract with the United States, or the amount an employer is required to deduct and withhold from wages

for federal income tax withholding purposes is changed or corrected by such service or authority or if a taxpayer's claim for credit or refund of federal income tax is disallowed in whole or in part, the taxpayer or employer shall report such change or correction in federal taxable income, federal items of tax preference, total taxable amount or ordinary income portion of a lump sum distribution, includible gain of a trust, federal credit for employment-related expenses, federal foreign tax credit or federal income tax withholding or such disallowance of the claim for credit or refund within ninety days after the final determination of such change, correction, renegotiation or disallowance, or as otherwise required by the commissioner, and shall concede the accuracy of such determination or state wherein it is erroneous. The allowance of a tentative carryback adjustment based upon a net operating loss carryback pursuant to section sixty-four hundred eleven of the internal revenue code [1] shall be treated as a final determination for purposes of this section. Any taxpayer filing an amended federal income tax return and any employer filing an amended federal return of income tax withheld shall also file within ninety days thereafter an amended return under this article, and shall give such information as the commissioner may require. The commissioner may by regulation prescribe such exceptions to the requirements of this section as he or she deems appropriate. For purposes of this section, (i) the term "taxpayer" shall include a partnership having a resident partner or having any income derived from New York sources, and a corporation with respect to which the taxable year of such change, correction, disallowance or amendment is a year with respect to which the election provided for in subsection (a) of section six hundred sixty is in effect, and (ii) the term "federal income tax return" shall include the returns of income required under sections six thousand thirty-one [2] and six thousand thirty-

[1] 26 U.S.C.A. § 6411.

[2] 26 U.S.C.A. § 6031.



seven of the internal revenue code.[3] In the case of such a corporation, such report shall also include any change or correction of the taxes described in paragraphs two and three of subsection (f) of section thirteen hundred sixty-six of the internal revenue code. Reports made under this section by a partnership or corporation shall indicate the portion of the change in each item of income, gain, loss or deduction (and, in the case of a corporation, of each change in, or disallowance of a claim for credit or refund of, a tax referred to in the preceding sentence) allocable to each partner or shareholder and shall set forth such identifying information with respect to such partner or shareholder as may be prescribed by the commissioner.

(As amended L.1988, c. 384, § 6; L.1990, c. 190, § 49.)

**N.Y. Tax Law § 659 (Supp. 1993)**

**§ 659. Report of federal changes, corrections or disallowances**

If the amount of a taxpayer's federal taxable income, federal items of tax preference or total taxable amount or ordinary income portion of a lump sum distribution reported on his federal income tax return for any taxable year, or the amount of a taxpayer's credit for employment-related expenses set forth on such return, or the amount of any federal foreign tax credit affecting the calculation of the credit for Canadian provincial taxes under section six hundred twenty or six hundred twenty-A, is changed or corrected by the United States internal revenue service or other competent authority, or as the result of a renegotiation of a contract or subcontract with the United States or the amount an employer is required to deduct and withhold from wages for federal income tax withholding purposes is changed or corrected by such service or authority or if a taxpayer's claim for credit or

[3] 26 U.S.C.A. § 6037.

refund of federal income tax is disallowed in whole or in part, the taxpayer or employer shall report such change or correction in federal taxable income, federal items of tax preference, total taxable amount or ordinary income portion of a lump sum distribution, federal credit for employment-related expenses, federal foreign tax credit or federal income tax withholding or such disallowance of the claim for credit or refund within ninety days after the final determination of such change, correction, renegotiation or disallowance, or as otherwise required by the tax commission, and shall concede the accuracy of such determination or state wherein it is erroneous. The allowance of a tentative carryback adjustment based upon a net opearting loss carryback pursuant to section sixty-four hundred eleven of the internal revenue code [1] shall be treated as a final determination for purposes of this section. Any taxpayer filing an amended federal income tax return and any employer filing an amended federal return of income tax withheld shall also file within ninety days thereafter an amended return under this article, and shall give such information as the tax commission may require. The tax commission may by regulation prescribe such exceptions to the requirements of this section as it deems appropriate.

(Added L.1960, c. 563, § 2; amended L.1970, c. 1005, § 21; L.1973, c. 449, § 2; L.1973, c. 526, § 1; L.1977, c. 59, § 6; L.1978, c. 607, § 10; L.1983, c. 15, § 36; L.1987, c. 28, § 89; L.1987, c. 274, § 5.)

**N.Y. Tax Law § 684 (McKinney 1993)**

**§ 684. Interest on underpayment**

(a) General.—If any amount of income tax is not paid on or before the last date prescribed in this article for payment, interest on such amount at the rate set by the tax commission pursuant to section six hundred ninety-

[1] For provisions of the internal revenue code, see 26 U.S.C.A.



seven, or if no rate is set, at the rate of six per cent per annum shall be paid for the period from such last date to the date paid, whether or not any extension of time for payment was granted. Interest under this subsection shall not be paid if the amount thereof is less than one dollar. If the time for filing of a return of tax withheld by an employer is extended, the employer shall pay interest for the period for which the extension is granted and may not charge such interest to the employee.

(b) Exception as to estimated tax.—This section shall not apply to any failure to pay estimated tax.

(c) Exception for mathematical error.—No interest shall be imposed on any underpayment of tax due solely to mathematical error if the taxpayer files a return within the time prescribed in this article (including any extension of time) and pays the amount of underpayment within three months after the due date of such return, as it may be extended.

[*(d) Repealed.*]

(e) Suspension of interest on deficiencies.—If a waiver of restrictions on assessment of a deficiency has been filed by the taxpayer, and if notice and demand by the tax commission for payment of such deficiency is not made within thirty days after the filing of such waiver, interest shall not be imposed on such deficiency for the period beginning immediately after such thirtieth day and ending with the date of notice and demand.

(f) Tax reduced by carryback.—If the amount of tax for any taxable year is reduced by reason of a carryback of a net opearting loss, such reduction in tax shall not affect the computation of interest under this section for the period ending with the filing date for the taxable year in which the net operating loss arises. Such filing date shall be determined without regard to extensions of time to file.

(g) Interest treated as tax.—Interest under this section shall be paid upon notice and demand and shall be assessed, collected and paid in the same manner as income tax. Any reference in this article to the tax imposed by this article shall be deemed also to refer to interest imposed by this section on such tax.

(h) Interest on penalties or additions to tax.—Interest shall be imposed under subsection (a) in respect of any assessable penalty or addition to tax only if such assessable penalty or addition to tax is not paid within ten days from the date of the notice and demand therefor under subsection (b) of section six hundred ninety-two, and in such case interest shall be imposed only for the period from such date of the notice and demand to the date of payment.

(i) Payment prior to notice of deficiency.—If, prior to the mailing to the taxpayer of a notice of deficiency under subsection (b) of section six hundred eighty-one, the tax commission mails to the taxpayer a notice of proposed increase of tax and within thirty days after the date of the notice of proposed increase the taxpayer pays all amounts shown on the notice to be due to the tax commission, no interest under this section on the amount so paid shall be imposed for the period after the date of such notice of proposed increase.

(j) Payment within ninety days after notice of deficiency.—If a notice of deficiency under section six hundred eighty-one is mailed to the taxpayer, and the total amount specified in such notice is paid on or before the ninetieth day after the date of mailing, interest under this section shall not be imposed for the period after the date of the notice.

(k) Payment within ten days after notice and demand. —If notice and demand is made for payment of any amount under subsection (b) of section six hundred ninety-two, and if such amount is paid within ten days after the date of such notice and demand, interest under



this section on the amount so paid shall not be imposed for the period after the date of such notice and demand.

(*l*) Limitation on assessment and collection.—Interest prescribed under this section may be assessed and collected at any time during the period within which the tax or other amount to which such interest relates may be assessed and collected, respectively.

(m) Interest on erroneous refund.—Any portion of tax or other amount which has been erroneously refunded, and which is recoverable by the tax commission, shall bear interest at the rate set by the tax commission pursuant to section six hundred ninety-seven, or if no rate is set, at the rate of six per cent per annum from the date of the payment of the refund, but only if it appears that any part of the refund was induced by fraud or a misrepresentation of a material fact.

(n) Satisfaction by credits.—If any portion of a tax is satisfied by credit of an overpayment, then no interest shall be imposed under this section on the portion of the tax so satisfied for any period during which, if the credit had not been made, interest would have been allowable with respect to such overpayment.

(Added L.1962, c. 1011, § 1; amended L.1971, c. 780, § 1; L.1983, c. 15, §§ 41, 80, 81; L.1985, c. 65, § 119.)

**N.Y. Tax Law § 634 (McKinney Supp. 1993)**

**§ 684. Interest on underpayment**

(a) General.—If any amount of income tax is not paid on or before the last date prescribed in this article for payment, interest on such amount at the rate set by the commissioner of taxation and finance pursuant to section six hundred ninety-seven, or if no rate is set, at the rate of six per cent per annum shall be paid for the period from such last date to the date paid, whether or not any extension of time for payment was granted. Interest under this subsection shall not be paid if the amount thereof is less than one dollar. If the time for filing of a

return of tax withheld by an employer is extended, the employer shall pay interest for the period for which the extension is granted and may not charge such interest to the empoyee.

[*See main volume for text of (b) and (c)*]

(d) Suspension of interest on deficiencies.—If a waiver of restrictions on assessment of a deficiency has been filed by the taxpayer, and if notice and demand by the tax commission for payment of such deficiency is not made within thirty days after the filing of such waiver, interest shall not be imposed on such deficiency for the period beginning immediately after such thirtieth day and ending with the date of notice and demand.

(e) Tax reduced by carryback.—If the amount of tax for any taxable year is reduced by reason of a carryback of a net operating loss, such reduction in tax shall not affect the computation of interest under this section for the period ending with the filing date for the taxable year in which the net operating loss arises. Such filing date shall be determined without regard to extensions of time to file.

(f) Interest treated as tax.—Interest under this section shall be paid upon notice and demand and shall be assessed, collected and paid in the same manner as income tax. Any reference in this article to the tax imposed by this article shall be deemed also to refer to interest imposed by this section on such tax.

(g) Interest on penalties or additions to tax.—Interest shall be imposed under subsection (a) in respect of any assessable penalty or addition to tax only if such assessable penalty or addition to tax is not paid within ten days from the date of the notice and demand therefor under subsection (b) of section six hundred ninety-two, and in such case interest shall be imposed only for the period from such date of the notice and demand to the date of payment.



(h) Payment within ten days after notice and demand.—If notice and demand is made for payment of any amount under subsection (b) of section six hundred ninety-two, and if such amount is paid within ten days after the date of such notice and demand, interest under this section on the amount so paid shall not be imposed for the period after the date of such notice and demand.

(i) Limitation on assessment and collection.—Interest prescribed under this section may be assessed and collected at any time during the period within which the tax or other amount to which such interest relates may be assessed and collected, respectively.

(j) Interest on erroneous refund.—Any portion of tax or other amount which has been erroneously refunded, and which is recoverable by the commissioner of taxation and finance, shall bear interest at the rate set by the commissioner pursuant to section six hundred ninety-seven, or if no rate is set, at the rate of six per cent per annum from the date of the payment of the refund, but only if it appears that any part of the refund was induced by fraud or a misrepresentation of a material fact.

(k) Satisfaction by credits.—If any portion of a tax is satisfied by credit of an overpayment, then no interest shall be imposed under this section on the portion of the tax so satisfied for any period during which, if the credit had not been made, interest would have been allowable with respect to such overpayment.

(As amended L.1989, c. 61, §§ 117, 147.)

**N.Y. Tax Law § 686(a) (McKinney 1987)**

**§ 686. Overpayment**

(a) General.—The tax commission, within the applicable period of limitations, may credit an overpayment of income tax and interest on such overpayment against any liability in respect of any tax imposed by this chapter on

the person who made the overpayment, against any liability in respect of any tax imposed pursuant to the authority of this chapter or any other law on such person if such tax is administered by the tax commission and, as provided in sections one hundred seventy-one-c, one hundred seventy-one-d and one hudred seventy-one-e of this chapter, against past-due support and against the amount of a default in repayment of a guaranteed student, state university or city university loan. The balance shall be refunded by the comptroller out of the proceeds of the tax retained by him for such general purpose. Any refund under this section shall be made only upon the filing of a return and upon a certificate of the tax commission approved by the comptroller. The comptroller, as a condition precedent to the approval of such a certificate, may examine into the facts as disclosed by the return of the person who made the overpayment and other information and data available in the files of the tax commission.

**N.Y. Tax Law § 686(a) (Supp. 1993)**

**§ 686. Overpayment**

(a) General.—The commissioner of taxation and finance, within the applicable period of limitations, may credit an overpayment of income tax and interest on such overpayment against any liability in respect of any tax imposed by this chapter on the person who made the overpayment, against any liability in respect of any tax imposed pursuant to the authority of this chapter or any other law on such person if such tax is administered by the commissioner of taxation and finance and, as provided in sections one hundred seventy-one-c, one hundred seventy-one-d, one hundred seventy-one-e and one hundred seventy-one-f of this chapter, against past-due support, a past-due legally enforceable debt, and against the amount of a default in repayment of a guaranteed student, state university or city university loan. The balance shall be refunded by the comptroller out of the proceeds of the tax



retained by him for such general purpose. Any refund under this section shall be made only upon the filing of a return and upon a certificate of the commissioner of taxation and finance approved by the comptroller. The comptroller, as a condition precedent to the approval of such a certificate, may examine into the facts as disclosed by the return of the person who made the overpayment and other information and data available in the files of the comissioner of taxation and finance.

[*See main volume for text of (b) to (h)*]

(As amended L.1992, c. 55, § 85.)

**N.Y. Tax Law § 687(c) (McKinney 1987)**

(c) Notice of federal change or correction.—A claim for credit or refund of any overpayment of tax attributable to a federal change or correction required to be reported pusuant to section six hunded fifty-nine shall be filed by the taxpayer within two years from the time the notice of such change or correction or such amended return was required to be filed with the tax commission. If the report or amended return required by section six hundred fifty-nine is not filed within the ninety day period therein specified, interest on any resulting refund or credit shall cease to accrue after such ninetieth day. The amount of such credit or refund shall not exceed the amount of the reduction in tax attributable to such federal change, correction or items amended on the taxpayer's amended federal income tax return. This subsection shall not affect the time within which or the amount for which a claim for credit or refund may be filed apart from this subsection.

**N.L. Tax Law § 687(c) (Supp. 1987)**

**§ 687. Limitations on credit or refund**

[*See main volume for text of (a) and (b)*]

(c) Notice of federal change or correction.—A claim for credit or refund of any overpayment of tax attributable

to a federal change or correction required to be reported pursuant to section six hundred fifty-nine shall be filed by the taxpayer within two years from the time the notice of such change or correction or such amended return was required to be filed with the commissioner of taxation and finance. If the report or amended return required by section six hundred fifty-nine is not filed within the ninety day period therein specified, no interest shall be payable on any claim for credit or refund of the overpayment attributable to the federal change or correction. The amount of such credit or refund shall not exceed the amount of the reduction in tax attributable to such federal change, correction or items amended on the taxpayer's amended federal income tax return. This subsection shall not affect the time within which or the amount for which a claim for credit or refund may be filed apart from this subsection.

*[See main volume for text of (d) to (k)]*

(As amended L.1989, c. 61, § 150.)

**N.Y. Tax Law § 690 (McKinney 1993)**

**§ 690. Review of tax commission decision**

(a) General.—A decision of the tax appeals tribunal shall be subject to judicial review in the manner provided for by section two thousand sixteen of this chapter.

(b) Judicial review exclusive remedy of taxpayer.—The review of a decision of the tax commission provided by this section shall be the exclusive remedy available to any taxpayer for the judicial determination of the liability of the taxpayer for the taxes imposed by this article.

(c) Assessment pending review; review bond.—Irrespective of any restrictions on the assessment and collection of deficiencies, the tax commission may assess a deficiency after the expiration of the period specified in subsection (a), notwithstanding that an application for



judicial review in respect of such deficiency has been duly made by the taxpayer, unless the taxpayer, at or before the time his application for review is made, has paid the deficiency, has deposited with the tax commission the amount of the deficiency, or has filed with the tax commission a bond (which may be a jeopardy bond under subsection (h) of section six hundred ninety-four) in the amount of the portion of the deficiency (including interest and other amounts) in respect of which the application for review is made and all costs and charges which may accrue against him in the prosecution of the proceeding, including costs of all appeals, and with surety approved by a justice of the supreme court of the state of New York, conditioned upon the payment of the deficiency (including interest and other amounts) as finally determined and such costs and charges. If as a result of a waiver of the restrictions on the assessment and collection of a deficiency any part of the amount determined by the tax commission is paid after the filing of the review bond, such bond shall, at the request of the taxpayer, be proportionately reduced.

(d) Credit, refund or abatement after review.—If the amount of a deficiency determined by the tax commission is disallowed in whole or in part by the court of review, the amount so disallowed shall be credited or refunded to the taxpayer, without the making of claim therefor, or, if payment has not been made, shall be abated.

(e) Date of finality of division of tax appeals determination or decision.—A determination of an administrative law judge in the division of tax appeals shall become final in accordance with subdivision four of section two thousand ten of this chapter. A decision of the tax appeals tribunal shall become final upon the expiration of the period specified in subsection (a) for making an application for review, if no such application has been duly made within such time, or if such application has been duly made, upon expiration of the time for all further

judicial review, or upon the rendering by the tax appeals tribunal of a decision in accordance with the mandate of the court on review. Notwithstanding the foregoing, for the purpose of making an application for review, the decision of the tax appeals tribunal shall be deemed final on the date the notice of such decision is served as provided in section two thousand sixteen of this chapter.

(Added L.1962, c. 1011, § 1; amended L.1987, c. 401, § 8.)

**N.Y. Tax Law § 692(c) (McKinney 1987)**

**§ 692**

(c) Issuance of warrant after notice and demand.—If any person liable under this article for the payment of any tax, addition to tax, penalty or interest neglects or refuses to pay the same within ten days after notice and demand therefor is given to such person under subsection (b), the tax commission may within six years after the date of such assessment issue a warrant under its official seal directed to the sheriff of any county of the state, or to any officer or employee of the department of taxation and finance, commanding him to levy upon and sell such person's real and personal property for the payment of the amount assessed, with the cost of executing the warrant, and to return such warrant to the tax commission and pay to it the money collected by virtue thereof within sixty days after the receipt of the warrant. If the tax commission finds that the collection of the tax or other amount is in jeopardy, notice and demand for immediate payment of such tax may be made by the tax commission and upon failure or refusal to pay such tax or other amount the tax commission may issue a warrant without regard to the ten-day period provided in this subsection.

**N.Y. Tax Law § 692(e) (MciKnney 1988)**

(e) Judgment.—When a warrant has been filed with the county clerk the tax commission shall, in the right of the people of the state of New York, be deemed to have



obtained judgment against the taxpayer for the tax or other amounts.

**N.Y.C.R.R. § 107.6 (1992)**

**107.6 Reasonable cause.**

(a) Where: (1) a taxpayer, employer or other person subject to the provisions of article 22 of the Tax Law:

(i) fails to file a New York State income tax return on or before the last date prescribed for filing (see section 685(a)(1) of the Tax Law for the addition to tax);

(ii) fails to pay the New York State income tax shown on a New York State income tax return on or before the last date prescribed for paying (see section 685(a)(2) of the Tax Law for the addition to tax);

(iii) fails to pay the New York State income tax required to be shown on a New York State income tax return within 10 days of the date of a notice and demand therefor (see section 685(a)(3) of the Tax Law for the addition to tax);

(iv) non-willfully fails to make a New York State employer's return and pay the New York State personal income tax withheld at the time required (see section 685(f) of the Tax Law for the addition to tax);

(v) fails to file certain New York State information returns on or before the prescribed date for filing (see section 685(h) of the Tax Law for the applicable penalties);

(vi) fails to make deposits of New York State income taxes on the dates prescribed therefore (see section 685(o) of the Tax Law for the penalty); or

(vii) fails to perform certain acts with respect to the quarterly combined withholding and wage reporting return (see section 685(v) of the Tax Law and section 174.2 of this Title for the applicable penalties); then

(2) the applicable addition or additions to tax, or penalty or penalties under section 685 of the Tax Law must be imposed, unless it is shown that such failure was due to reasonable cause and not due to willful neglect. In the event that these additions to tax or penalties have been imposed and it is later determined that any such failure was due to reasonable cause and not due to willful neglect, all or part of such additions to tax or penalties will be cancelled. The absence of willful neglect alone is not sufficient grounds for not imposing additions to tax or penalties or for cancelling additions to tax or penalties.

(b) Except where reasonable cause is presumed in accordance with subdivision (c)(2) of this section, all of the facts alleged as a basis for reasonable cause must be affirmatively shown in a written statement made by the taxpayer, employer or other person against whom the additions to tax or penalties have been assessed or are assessable. Where such taxpayer, employer or other person is unable to provide such statement or does not have a personal knowledge of such facts, a showing of reasonable cause may be made on behalf of the taxpayer, employer or other person by an individual with a personal knowledge of such facts. In determining whether reasonable cause exists, in addition to an evaluation of such facts, the taxpayer's, employer's or other person's previous compliance record with respect to all of the taxes imposed pursuant to the Tax Law may be taken into account.

(c)(1) Reasonable cause shall not be determined to exist as a basis for not imposing or for cancelling



the additions to tax for failure to file a New York State income tax return or for failure to pay the amount of New York State income tax shown on such return, under, respectively, section 685(a)(1) and (2) of the Tax Law, where it is determined that the taxpayer or the taxpayer's duly authorized representative could have reasonably been expected to timely request extensions of time to file the New York State income tax return or extensions of time to pay the New York State income tax due, but failed to do so. However, reasonable cause may be determined to exist with respect to these additions to tax where:

(i) no extensions of time to file the New York State income tax return or no extensions of time to pay the New York State income tax due have been requested and it is determined that, given the circumstances, it would have been unreasonable to expect such extensions to be requested;

(ii) a taxpayer has complied with and exhausted all of the provisions with respect to extensions of time for filing the New York State income tax return or extensions of time for paying the New York State income tax due but was nevertheless unable to file or to pay on or before the extended due dates.

(2) A showing of reasonable cause with respect to the addition to tax, under section 685(a)(2) of the Tax Law, for the failure to pay the amount of New York State income tax shown on any New York State income tax return will be presumed, with respect to any underpayment of New York State income tax, where the taxpayer has:

(i) satisfied the requirements of section 157.2 of this Title, relating to an automatic ex-

tension of time for filing a New York State income tax return; and

(ii) the excess of the amount of New York State income tax shown on the New York State income tax return over the amount of New York State income tax paid on or before the date prescribed for the filing of the New York State income tax return (by virtue of New York State income tax withheld, payments of estimated tax and the payment in full of the estimated New York State income tax liability pursuant to section 157.2[a][4] of this Title) is no greater than 10 percent of the amount of New York State income tax shown on the New York State income tax return; and

(iii) any balance due shown on the New York State income tax return is remitted with such return. This presumption of reasonable cause will apply to only that period of time for which a taxpayer has an automatic extension of time for filing the New York State income tax return and, if any, the additional extension of time for filing such return.

(d) The following exemplify grounds for reasonable cause, where clearly established by or on behalf of the taxpayer, employer or other person:

(1) The death or serious illness of the taxpayer, employer or other person against whom the additions to tax or penalties have been assessed or are assessable, a member of such party's family, such party's personal representative or employer, or the unavoidable absence of the taxpayer, employer, other person or personal representative from the usual place of business, which precluded timely compliance, may constitute reasonable cause provided that:



(i) in the case of the failure to file any New York State income tax return, the applicable New York State income tax return is filed; or

(ii) in the case of the failure to pay or deposit any New York State income tax, such amount is paid or deposited;

within a justifiable period of time after the death, illness, or absence. A justifiable period of time is that period which is substantiated by or on behalf of the taxpayer, employer or other person as a reasonable period of time for filing the New York State income tax return and/or for paying any New York State income tax based on the facts and circumstances in each case.

*Example:* It was established that illness incapacitated the taxpayer during the period of delinquency, as well as during the period when extensions of time to file the New York State income tax return or pay the New York State income tax due could have been requested.

It was further established that no other person had access to sufficient information which would enable such person to either timely request extensions of time to file and to pay the New York State income tax due or to timely file the delinquent New York State income tax return and pay the New York State income tax due. The New York State income tax return was filed and the New York State income tax due was paid within a justifiable period of time after the taxpayer recuperated. This constitutes reasonable cause for failure to file the New York State income tax return and for failure to pay the New York State income tax due.

(2) The destruction of the place of business or business records of the taxpayer, employer or other person against whom the additions to tax or penalties have been assessed or are assessable, the place of business or business records of such party's personal representative or employer, or the taxpayer's residence or income records, including wage and tax statements and returns of information, by a fire or other documented casualty, which precluded timely compliance, may constitute reasonable cause provided that:

(i) in the case of the failure to file any New York State income tax return, the applicable New York State income tax return is filed; or

(ii) in the case of the failure to pay or deposit any New York State income tax, such amount is paid or deposited;

within a justifiable period of time after the casualty takes place. A justifiable period of time is that period which is substantiated by or on behalf of the taxpayer, employer or other person as a reasonable period of time for filing the New York State income tax return and/or for paying any New York State income tax based on the facts and circumstances in each case.

*Example:* The residence, together with the income records and the New York State personal income tax return, of a taxpayer were destroyed by a documented casualty immediately prior to the date prescribed for filing the New York State personal income tax return and paying the New York State personal income tax due. Due to the disorder created by the casualty and the proximity to the due date, the taxpayer could not have been expected to timely request extensions of time to file and to pay



the New York State personal income tax due. The income records of the taxpayer were reconstructed based on information received from the taxpayer's employer and various banks. Within a justifiable period of time after the casualty took place a New York State personal income tax return was filed and the New York State personal income tax due was paid. This constitutes reasonable cause for failure to file the New York State personal income tax return and for failure to pay the New York State personal income tax due.

(3) A pending petition to the Commissioner of Taxation and Finance for an advisory opinion or a declaratory ruling, a pending conciliation conference proceeding in the Bureau of Conciliation and Mediation Services of the Division of Taxation, a pending petition to the Division of Tax Appeals or a pending action or proceeding for judicial determination may constitute reasonable cause, until the time in which the taxpayer has exhausted its administrative or judicial remedies, as applicable, for a taxable period or periods the New York State income tax return or returns for which are due subsequent to the filing of the petition with the Commissioner of Taxation and Finance, the commencement of the conciliation conference proceeding, the filing of the petition with the Division of Tax Appeals or the commencement of the judicial action or proceeding provided that:

(i) the petition, action or proceeding involves a question or issue affecting whether or not the individual or entity is subject to New York State income tax and/or required to file a New York State income tax return;

(ii) the petition, action or proceeding is not based on a position which is frivolous nor is it

intended to delay or impede the administration of article 22 of the Tax Law; and

(iii) the facts and circumstances for such taxable period or periods are identical or virtually identical to those of the taxable period or periods covered by the petition, action or proceeding.

*Example:* An individual is awaiting a determination, after a hearing, of an administrative law judge of the Division of Tax Appeals regarding whether or not such individual was subject to New York State personal income tax and required to file a New York State personal income tax return in a prior taxable period. The individual's petition on the matter to the Division of Tax Appeals was filed prior to the due date for the New York State personal income tax return for the current taxable period. The facts and circumstances for the current taxable period are identical to those of the period covered by the petition. The individual's position is arguable and has merit based on case law. This constitutes reasonable cause for failure to file a New York State personal income tax return and for failure to pay the New York State personal income tax return and for failure to pay the New York State personal income tax due for the current taxable period.

(4) Any other cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause. Ignorance of the law, however, will not be considered as a basis for reasonable cause.



(e) An inability to timely obtain and assemble essential information (including wage and tax statements or returns of information from an employer or payor) required for the preparation of a complete New York State income tax return shall not be a basis for reasonable cause. Where an inability to timely obtain and assemble essential information required for the preparation of a complete New York State income tax return exists and extensions of time for filing such return are available under Part 157 of this Title, such extensions of time for filing must be obtained, a New York State income tax return which reflects the known New York State income tax liability must be filed on or before the extended due date for filing and any balance of New York State income tax must be paid with the New York State income tax return on that portion of the New York State income tax liability which can be ascertained and shown on such return. The relevant facts affecting that portion of the New York State income tax liability which cannot be ascertained must be fully disclosed with the timely filed New York State income tax return. When such liability is ascertained, an amended New York State income tax return must be immediately filed and any additional New York State income tax due paid with such return.

(f) The provisions of subdivisions (a), (b) and (d) of this section shall apply to the extent pertinent where any person has failed to supply correct identifying numbers as required by section 158.1(c) of this Title and such failure was due to reasonable cause and not due to willful neglect (see section 685(k) of the Tax Law for the applicable penalties). In addition to any relevant grounds for reasonable cause as exemplified in subdivision (d) of this section, further grounds for reasonable cause for failure to secure and supply such numbers, where clearly established, may include the following:

(1) a reliance in good faith on an identifying number provided to such person which subsequently proves to be erroneous; or

(2) awaiting the issuance of an identifying number or the inability to secure an identifying number despite repeated documentable attempts to do so.

(g)(1) The provisions of subdivisions (a), (b) and (d) of this section shall also apply to the extent pertinent where any taxpayer substantially understates the amount of New York State income tax for any taxable year and such understatement, or part thereof, was due to reasonable cause (see section 685(p) of the Tax Law for the addition to tax). Reasonable cause may be determined to exist only where the taxpayer has acted in good faith. Further, reasonable cause and good faith shall be considered as a basis for cancellation or waiver of all or part of the assessed or assessable addition to tax imposed under section 685(p) of the Tax Law only after the understatement of New York State income tax has been reduced in accordance with the provisions of such section by that portion of the New York State income tax attributable to any item for which there is or was substantial authority for the New York State income tax treatment thereof or for which the relevant facts affecting the New York State income tax treatment were adequately disclosed with the original tax return.

(2) In determining whether reasonable cause and good faith exist, the most important factor to be considered is the extent of the taxpayer's efforts to ascertain the proper New York State income tax liability. In addition to any relevant grounds for reasonable cause as exemplified in subdivision (d) of this section, circumstances that indicate reasonable cause and good faith with respect to the substantial understatement of New York State income tax, where clearly established by or on behalf of the taxpayer, may include the following:



(i) an honest misunderstanding of fact or law that is reasonable in light of the experience, knowledge and education of the taxpayer;

(ii) a computational or transcriptional error;

(iii) the reliance by the taxpayer on any written information, professional advice or other facts, provided such reliance was reasonable and the taxpayer had no knowledge of circumstances which should have put the taxpayer upon inquiry as to whether such facts were erroneous; or

(iv) the filing of an amended New York State income tax return which shows an additional amount of New York State income tax due or which adequately disclosed the New York State income tax treatment of an item which should have been adequately disclosed with the original New York State income tax return, provided the amended New York State income tax return is filed prior to the time the taxpayer is first contacted by the Department of Taxation and Finance concerning an audit or an examination of the New York State income tax return.

(3) No inference shall be drawn from any of the provisions of this subdivision, with respect to establishing reasonable cause under any other subdivision of this section.

(h) The provisions of this section are also applicable to the local taxes imposed under the authority of articles 30 (City of New York Personal Income Tax on Residents), 30-A (City of Yonkers Income Tax Surcharge on Residents) and 30-B (City of Yonkers Earnings Tax on Nonresidents) of the Tax Law and article 2-E (City of New York Earnings Tax on Nonresidents) of the General City Law.

## APPENDIX D

§ 58.1-1805. Memorandum of lien for collection of taxes.—A. If any taxes or fees, including penalties and interest, assessed by the Department of Taxation in pursuance of law against any person, are not paid within thirty days after the same become due, the Tax Commissioner may file a memorandum of lien in the circuit court clerk's office of the county or city in which the taxpayer's place of business is located, or in which the taxpayer resides. If the taxpayer has no place of business or residence within the Commonwealth, such memorandum may be filed in the Circuit Court of the City of Richmond. A copy of such memorandum may also be filed in the clerk's office of all counties and cities in which the taxpayer owns real estate. Such memorandum shall be recorded in the judgment docket book and shall have the effect of a judgment in favor of the Commonwealth, to be enforced as provided in Article 19 (§ 8.01-196 et seq.) of Chapter 3 of Title 8.01, except that a writ of fieri facias may issue at any time after the memorandum is filed. The lien on real estate shall become effective at the time the memorandum is filed in the jurisdiction in which the real estate is located. No memorandum of lien shall be filed unless the taxpayer is first given ten or more days' prior notice of intent to file a lien; however, in those instances where the Tax Commissioner determines that the collection of any tax, penalties or interest required to be paid pursuant to law will be jeopardized by the provision of such notice, notification may be provided to the taxpayer concurrent with the filing of the memorandum of lien. Such notice shall be given to the taxpayer at his last known address. For purposes of this section, "*last known address*" means the address shown on the most recent return filed by or on behalf of the taxpayer or the address provided in correspondence by or on behalf of the taxpayer indicating that it is a change of the taxpayer's address.



B. Recordation of a memorandum of lien hereunder shall not affect the right to a refund or exoneration under this chapter, nor shall an application for correction of an erroneous assessment affect the power of the Tax Commissioner to collect the tax, except as specifically provided in this title.

C. If after filing a memorandum of lien as required by subsection A, the Tax Commissioner determines that it is in the best interest of the Commonwealth, the Tax Commissioner may place padlocks on the doors of any business enterprise that is delinquent in either filing or paying any tax owed to the Commonwealth, or both. He shall also post notices of distraint on each of the doors so padlocked. If after three business days, the tax deficiency has not been satisfied or satisfactory arrangements for payment made, the Tax Commissioner may cause a writ of fieri facias to be issued.

It shall be a Class 1 misdemeanor for anyone to enter the padlocked premises without prior approval of the Tax Commissioner.

In the event that the taxpayer against whom the distraint has been applied subsequently makes application for correction of the assessment under § 58.1-1821, the taxpayer shall have the right to post bond equaling the amount of the tax liability in lieu of payment until the application is acted upon.

The provisions of subsection C shall be enforceable only after the promulgation, by the Tax Commissioner, of regulations under the Administrative Process Act.

§ 58.1-1806. Additional proceedings for the collection of taxes; jurisdiction and venue.—The payment of any state taxes and the filing of returns may, in addition to the remedies provided in this chapter be enforced by action at law, suit in equity or by attachment in the same manner, to the same extent and with the same rights of appeal as now exist or may hereafter be provided by law

for the enforcement of demands between individuals. The venue for any such proceeding under this section shall be as specified in subdivision 13 a of § 8.01-261. Such proceedings shall be instituted and conducted in the name of the Commonwealth of Virginia.

§ 58.1-1807. Judgment or decree; effect thereof; enforcement.—In any proceeding under § 58.1-1806 the court shall have the power to determine the proper taxes, and to enter an order requiring the taxpayer to file all returns and pay all taxes, penalties and interest with which upon a correct assessment he is chargeable for any year or years not barred by the statute of limitations at the time the proceedings were instituted. If any taxes of which collection is sought have been erroneously charged, the court may order exoneration thereof. Payment of any judgment or decree shall be enforced against the taxpayer in the same manner that it could be enforced in a proceeding between individuals. (Code 1950, §§ 58-44, 58-1017; 1984, c. 675.)

§ 58.1-1812. Assessment of omitted taxes by the Department of Taxation.—A. If the Tax Commissioner ascertains that any person has failed to make a proper return or to pay in full any proper tax he shall assess the taxes prescribed by law, adding to the taxes so assessed the penalty prescribed by law, if any, for the failure to file a return (if a return was required by law but not filed within the time prescribed by law) and the penalty or penalties prescribed by law for the failure to pay the taxes and penalty or penalties within the time prescribed by law. If no penalty is so prescribed, he shall assess a penalty of 5 percent of the tax due, or if the failure to pay in full was fraudulent, a penalty of 100 percent of the tax due. In addition thereto, interest on the outstanding tax and penalty shall be charged at the rate established under § 58.1-15 for the period between the due date and the date of full payment.



Except as otherwise provided by law, the amount of tax shall be assessed within three years after the return was filed, whether such return was filed on or after the date prescribed, and no proceeding in court without assessment shall be begun for the collection of such tax after the expiration of such period. A return of tax filed before the last day prescribed by law for the timely filing thereof shall be considered as filed on the last day. A return of recordation tax shall be considered as having been filed on the date of recordation. If no return is filed, the tax may be assessed within six years of the date such return was due. If a false or fraudulent return is filed with intent to evade the payment of tax, an assessment may be made at any time.

Upon such assessment, the Department of Taxation shall send a bill therefor to the taxpayer and the taxes, penalties and interest shall be remitted to the Department of Taxation within thirty days from the date of such bill. If such taxes, penalties and interest are not paid within such thirty days, interest at the rate provided herein shall accrue thereon from the date of such assessment until payment.

B. The Department of Taxation shall not assess penalty or interest on any assessment of tax for the recovery of an erroneous refund, as defined in this section, provided that the tax is paid to the Department within thirty days from the date of the bill. If the tax is not remitted to the Department within thirty days from the date of such bill, interest at the rate provided herein shall accrue thereon from the date of such assessment until payment.

As used in this section "erroneous refund" means any refund of tax resulting solely from an error by the Department of Taxation which results in the taxpayer receiving a refund to which the taxpayer is not entitled.

§ 58.1-1820. Definitions.—The following words, terms and phrases when used in this article shall have the meanings ascribed to them in this section.

1. *"Person assessed with any tax,"* with standing to contest such assessment, shall include the person in whose name such assessment is made, a conumer of goods who, pursuant to law or contract, has paid any sales or use tax assessed against a dealer, a consumer of real estate construction who has by contract specifically agreed to pay the taxes assessed on the contractor, and any dealer who agrees to pass on to his customers the amount of any refund (net after expenses of the refund proceeding) to the extent such tax has been passed on to such customers.

2. *"Assessment,"* as used in this subtitle, shall include a written assessment made pursuant to notice by the Department of Taxation and self-assessments made by a taxpayer upon the filing of a return or otherwise not pursuant to notice. Assessments made by the Department of Taxation shall be deemed to be made when a written notice of assessment is delivered to the taxpayer by an employee of the Department of Taxation, or mailed to the taxpayer at his last known address. Self-assessments shall be deemed made when the tax is paid or, in the case of taxes requiring an annual or monthly return, when the return is filed. A return filed or tax paid before the last day prescribed by law or by regulations pursuant to law for the filing or payment thereof, shall be deemed to be filed or paid on such last day.

§ 58.1-1821. Application to Tax Commissioner for correction.—Any person assessed with any tax administered by the Department of Taxation may, within ninety days from the date of such assessment, apply for relief to the Tax Commissioner. Such application shall be in the form prescribed by the Department, and shall fully set forth the grounds upon which the taxpayer relies and all facts relevant to the taxpayer's contention. The Tax Commissioner may also require such additional information, testimony or documentary evidence as he deems necessary to a fair determination of the application.



On receipt of a notice of intent to file under this section, the Tax Commissioner shall refrain from collecting the tax until the time for filing hereunder has expired, unlless he determines that colection is in jeopardy.

Any person whose tax assessment has been improperly collected by the Department may apply hereunder to assert a claim that any amount so collected was exempt from process.

§ 58.1-1822. Action of Tax Commissioner on application for correction.—If the Tax Commissioner is satisfied, by evidence submitted to him or otherwise, that an applicant is erroneously or improperly assessed with any tax administered by the Department of Taxation, the Tax Commissioner may order that such assessment be corrected. If the assessment exceeds the proper amount, the Tax Commissioner shall order that the applicant be exonerated from the payment of so much as is erroneously or improperly charged, if not already paid into the state treasury, and, if paid, that it be refunded to him. If the assessment is less than the proper amount, the Tax Commissioner shall order that the applicant pay the proper taxes. He shall refund to the taxpayer any exempt funds which have been impropery collected. The Tax Commissioner shall refrain from collecting a contested assessment until he has made a final determination under this section unless he determines that collection is in jeopardy. (Code 1950, § 58-1119; 1972, c. 721; 1980, c. 633; 1984, c. 675.)

§ 58.1-1823. Reassessment and refund upon the fiing of amended return.—A. Any person filing a tax return required for any tax administered by the Department of Taxation may file an amended return with the Department

(i) within three years from the last day prescribed by law for the timely filing of the return; (ii) within ninety days from the final determination of any change or correction in the liability of the taxpayer for any federal tax upon which the state tax is based, whichever is later, provided that the refund does not exceed the amount of the decrease in Virginia tax attributable to such federal change or correction; or (iii) within one year from the filing of an amended Virginia return resulting in the payment of additional tax, provided that the amended return raises issues relating solely to such prior amended return and that the refund does not exceed the amount of the payment with such prior amended return. If the Department is satisfied, by evidence submitted to it or otherwise, that the tax assessed and paid upon the original return exceeds the proper amount, the Department may reassess the taxpayer and order that any amount excessively paid be refunded to him. The Department may reduce such refund by the amount of any taxes, penalties and interest which are due for the period covered by the amended return, or any past-due taxes, penalties and interest which have been assessed within the appropriate period of limitations. Any order of the Department denying such reassessment and refund, or the failure of the Department to act thereon within three motnhs shall, as to matters first raised by the amended return, be deemed an assessment for the purpose of enabling the taxpayer to pursue the remedies allowed under this chapter.

B. Notwithstanding the time limitation contained in subsection A, an amended individual income tax return claiming a refund for taxes paid with respect to retirement or pension benefits received from a federal retirement system created by the federal government for any officer or employee of the United States, including the United States Civil Service, the United States Armed Forces, or any agency or subdivision thereof for any taxable year beginning on or after January 1, 1985, may be filed within one year from the entry of a final judicial



order of a court of competent jurisdiction not subject to further appeal resolving the issue of the application to Virginia income tax law of the United States Supreme Court decision in the case of Davis v. Michigan Department of the Treasury, 57 U.S.L.W. 4389 (U.S. March 28, 1989).

C. Notwithstanding the statute of limitations established in this section, any retired employee of a political subdivision of the Commonwealth, established pursuant to Chapter 627 of the 1958 Acts of Assembly may file an amended individual income tax return until May 1, 1990, for taxable years beginning on and after January 1, 1985, and before January 1, 1986, for taxes paid on retirement income exempt pursuant to § 58.1-322.

§ 58.1-1823. Reassessment and refund upon the filing of amended return.—A. Any person filing a tax return required for any tax administered by the Department of Taxation may, within three years from the last day prescribed by law for the timely filing of the return, or within sixty days from the final determination of any change or correction in the liability of the taxpayer for any federal tax upon which the state tax is based, whichever is later, file an amended return with the Department. If the Department is satisfied, by evidence submitted to it or otherwise, that the tax assessed and paid upon the original return exceeds the proper amount, the Department may reassess the taxpayer and order that any amount excessively paid be refunded to him. The Department may reduce such refund by the amount of any taxes, penalties and interest which are due for the period covered by the amended return, or any past-due taxes, penalties and interest which have been assessed within the appropriate period of limitations. Any order of the Department denying such reassessment and refund, or the failure of the Department to act thereon within three months shall, as to matters first raised by the amended return, be deemed

an assessment for the purpose of enabling the taxpayer to pursue the remedies allowed under this chapter.

B. Notwithstanding the time limitation contained in subsection A, an amended individual income tax return claiming a refund for taxes paid with respect to retirement or pension benefits received from a federal retirement system created by the federal government for any officer or employee of the United States, including the United States Civil Service, the United States Armed Forces, or any agency or subdivision thereof for any taxable year beginning on or after January 1, 1985, may be filed within one year from the entry of a final judicial order of a court of competent jurisdiction not subject to further appeal resolving the issue of the application to Virginia income tax law of the United States Supreme Court decision in the case of Davis v. Michigan Department of the Treasury, 57 U.S.L.W. 4389 (U.S. March 28, 1989).

C. Notwithstanding the statute of limitations established in this section, any retired employee of a political subdivision of the Commonwealth, established pursuant to Chapter 627 of the 1958 Acts of Assembly may file an amended individual income tax return until May 1, 1990, for taxable years beginning on and after January 1, 1985, and before January 1, 1986, for taxes paid on retirement income exempt pursuant to § 58.1-322 of the Code of Virginia.

§ 58.1-1824. Protective claim for a refund.—Any person who has paid an assessment of taxes administered by the Department of Taxation may preserve his judicial remedies by filing a claim for refund with the Tax Commissioner on forms prescribed by the Department within three years of the date such tax was assessed. Such taxpayer may, at any time before the end of one year after the date of the Tax Commissioner's decision on such claim, seek redress from the circuit court under § 58.1-1825. The Tax Commissioner may decide such claim on the merits in the manner provided in § 58.1-1822 for appeals



under § 58.1-1821, or may, in his discretion, hold such claim without decision pending the conclusion of litigation affecting such claim. The fact that such claim is pending shall not be a bar to any other action under this chapter.

§ 58.1-1825. (Effective until July 1, 1992) Application to court for correction of erroneous or improper assessments of state taxes generally.—Any person assessed with any tax administered by the Department of Taxation and aggrieved by any such assessment may, unless otherwise specifically provided by law, within three years from the date such assessment is made, apply to a circuit court for relief. The venue for such proceeding shall be as specified in subdivision 13 b of § 8.01-261. The application shall be before the court when it is filed in the clerk's office. Such application shall not be deemed filed unless the assessment has been paid.

Any person whose assessment has been improperly collected from property exempt from process may within three years from the date such assessment is made, or if later, within one year of the Tax Commissioner's decision on a process exemption claim under § 58.1-1821 apply to a circuit court for relief. The venue for such proceeding shall be as specified in subdivision 13 b of § 8.01-261.

The Department shall be named as defendant and the proceedings shall be conducted as an action at law before the court sitting without a jury. It shall be the burden of the applicant in any such proceeding to show that the assessment or collection complained of is erroneous or otherwise improper. The court's order shall be entered pursuant to § 58.1-1826.

§ 58.1-1825. (Effective July 1, 1992) Application to court for correction of erroneous or improper assessments of state taxes generally.—Any person assessed with any tax administered by the Department of Taxation and aggrieved by any such assessment may, unless otherwise

specifically provided by law, within three years from the date such assessment is made, apply to a circuit court for relief. The venue for such proceeding shall be as specified in subdivision 13 b of § 8.01-261. The application shall be before the court when it is filed in the clerk's office. Such application shall not be deemed filed unless (i) the assessment has been paid or (ii) in lieu of payment, the taxpayer has posted bond pursuant to the provisions of § 16.1-107, with corporate surety licensed to do business in Virginia, within 90 days from the date such assessment is made.

Any person whose assessment has been improperly collected from property exempt from process may within three years from the date such assessment is made, or if later, within one year of the Tax Commissioner's decision on a process exemption claim under § 58.1-1821 apply to a circuit court for relief. The venue for such proceedings shall be as specified in subdivision 13 b of § 8.01-261.

The Department shall be named as defendant and the proceedings shall be conducted as an action at law before the court sitting without a jury. It shall be the burden of the applicant in any such proceeding to show that the assessment or collection complained of is erroneous or otherwise improper. The court's order shall be entered pursuant to § 58.1-1826.

§ 58.1-1826. Action of court.—If the court is satisfied that the applicant is erroneously or improperly assessed with any taxes, the court may order that the assessment be corrected. If the assessment exceeds the proper amount, the court may order that the applicant be exonerated from the payment of so much as is erroneously or improperly charged, if not already paid and, if paid, that it be refunded to him. If the assessment is less than the proper amount, the court shall order that the applicant pay the proper taxes and to this end the court shall be clothed with all the powers and duties of the authority



which made the assessment complained of as of the time when such assessment was made and all the powers and duties conferred by law upon such authority between the time such assessment was made and the time such application is heard. The court may order that any amount which has been improperly collected be refunded to such applicant. A copy of any order made under this section or § 58.1-1827 correcting an erroneous or improper assessment shall be certified by the clerk of the court to the Tax Commissioner.

§ 58.1-1827. Correction of double assessments.—Irrespective of the foregoing provisions, when it is shown to the satisfaction of the court that there has been a double assessment in any case, one of which assessments is proper and the other erroneous, and that a proper single tax has been paid thereon, the court may order that such erroneous assessment be corrected, whether the erroneous tax has been paid or not and even though the application was not made within the period of limitation, as hereinbefore required.

§ 58.1-1829. Costs in proceedings under §§ 58.1-1825 through 58.1-1828.—If the final order of the court in any proceeding under §§ 58.1-1825 through 58.1-1828 grants the relief prayed for, no costs shall be taxed against the applicant; but in no event shall any costs be taxed against the Commonwealth in any proceeding under such sections.

§ 58.1-1830. Effect of order.—An order of exoneration under §§ 58.1-1826, 58.1-1827 or § 58.1-1828, when delivered to the Tax Commissioner, shall restrain him from collecting so much as is thus erroneously charged. If what was so erroneously charged has been paid, the order of the court under §§ 58.1-1826, 58.1-1827 or § 58.1-1828, when presented to the appropriate state or local official, shall serve as the only direction necessary to obtain refund of the amount so ordered.

§ 58.1-1831. No injunctions against assessment or collection of taxes.—No suit for the purpose of restraining the assessment or collection of any tax, state or local, shall be maintained in any court of this Commonwealth, except when the party has no adequate remedy at law.



## APPENDIX E

### Wis. Stat.

71.82 Interest. (1) NORMAL. (a) In assessing taxes interest shall be added to such taxes at 12% per year from the date on which such taxes if originally assessed would have become delinquent if unpaid, to the date on which such taxes when subsequently assessed will become delinquent if unpaid.

(b) Except as otherwise specifically provided, in crediting overpayments of income and surtaxes against underpayments or against taxes to be subsequently collected and in certifying refunds of such taxes interest shall be added at the rate of 9% per year from the date on which such taxes when assessed would have become delinquent if unpaid to the date on which such overpayment was certified for refund except that if any overpayment of tax is certified for refund within 90 days after the last date prescribed for filing the return of such tax or 90 days after the date of actual filing of the return of such tax, whichever occurs later, no interest shall be allowed on such overpayment. For purposes of this section the return of such tax shall not be deemed actually filed by an employe unless and until the employe has included the written statement required to be filed under § 71.65 (1). However, when any part of a tax paid on an estimate of income, whether paid in connection with a tentative return or not, is refunded or credited to a taxpayer, such refund or credit shall not draw interest.

(c) Any assessment made as a result of the adjustment or disallowance of a claim for credit under § 71.07, 71.78 or 71.47 or subch. VIII or IX, except as provided in sub. (2)(c), shall bear interest at 12% per year from the due date of the claim.

(2) DELINQUENT. (a) *Income and franchise taxes.* Income and franchise taxes shall become delinquent if not paid when due under §§ 71.03 (8), 71.24 (9) and 71.44

(4), and when delinquent shall be subject to interest at the rate of 1.5% per month until paid.

(b) *Department may reduce delinquent interest.* The department shall provide by rule for reduction of interest under par. (a) to 12% per year in stated instances wherein the secretary of revenue determines that reduction is fair and equitable.

(c) *Adjustment to credits.* Any assessment made as a result of the disallowance of a claim for credit made under § 71.07, 71.28 or 71.47 or subch. VIII or IX with fraudulent intent, or of a portion of a claim made under said subchapters or sections that was excessive and was negligently prepared, shall bear interest from the due date of the claim, until refunded or paid, at the rate of 1.5% per month.

(d) *Withholding tax.* Of the amounts required to be withheld any amount not deposited or paid over to the department within the time required shall be deemed delinquent and deposit reports or withholding reports filed after the due date shall be deemed late. Delinquent deposits or payments shall bear interest at the rate of 1.5% per month from the date deposits or payments are required under this section until deposited or paid over to the department. The department shall provide by rule for reduction of interest on delinquent deposits to 12% per year in stated instances wherein the secretary of revenue determines reduction fair and equitable. In the case of a timely filed deposit or withholding report, withheld taxes shall become delinquent if not deposited or paid over on or before the due date of the report. In the case of no report filed or a report filed late, withheld taxes shall become delinquent if not deposited or paid over by the due date of the report. In the case of an assessment under § 71.83(1)(b)(2), the amount assessed shall become delinquent if not paid on or before the first day of the calendar month following the calendar month in which the assessment becomes final, but if the assessment is contested before the tax appeals commission or in the courts, it shall become delinquent on the 30th day following the date on which the order or judgment representing final determination becomes final.



71.83 Penalties. (1) CIVIL. (a) *Negligence.* 1. Failure to file. In case of failure to file any return required under § 71.03, 71.24 or 71.44 on the due date prescribed therefor, including any extension of time for filing, unless it is shown that the failure is due to reasonable cause and not due to wilful neglect, there shall be added to the amount required to be shown as tax on the return 5% of the amount of the tax if the failure is for not more than one month, with an additional 5% for each additional month or fraction thereof during which the failure continues, not exceeding 25% in the aggregate. For purposes of this subdivision, the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the due date prescribed for payment and by the amount of any credit against the tax which may be claimed upon the return.

2. Incomplete or incorrect return. If any person required under this chapter to file an income or franchise tax return files an incomplete or incorrect return, unless it is shown that such filing was due to good cause and not due to neglect, there shall be added to such person's tax for the taxable year 25% of the amount otherwise payable on any income subsequently discovered or reported. The amount so added shall be assessed, levied and collected in the same manner as additional normal income or franchise taxes, and shall be in addition to any other penalties imposed by this chapter. In this subdivision, "return" includes a separate return filed by a spouse with respect to a taxable year for which a joint return is filed under § 71.03 (2) (g) to (L) after the filing of that separate return, and a joint return filed by the spouses

with respect to a taxable year for which a separate return is filed under § 71.03 (2) (m) after the filing of that joint return.

3. Incomplete or incorrect deposit or withholding report. If any person required under subch. X to file a deposit report or withholding report files an incomplete or incorrect report, or fails to properly withhold or fails to properly deposit or pay over withheld funds, unless it can be shown that the filing or failure was due to good cause and not due to neglect, there shall be added to the tax 25% of the amount not reported or not withheld, deposited or paid over. The amount so added shall be assessed, levied and collected in the same manner as additional income or franchise taxes, and shall be in addition to any other penalties imposed in this subchapter. "Person," in this subdivision, includes an officer or employe of a corporation or other responsible person or a member or employe of a partnership or other responsible person who, as such officer, employe, member or other responsible person, is under a duty to perform the act in respect to which the violation occurs.

4. Late filing of withholding report. In case of failure to file any withholding deposit or payment report required under § 71.65 (3) on the date prescribed therefor, unless it is shown that the failure is due to reasonable cause and not due to wilful neglect, there shall be added to the amount required to be shown as withheld taxes on the report 5% of the amount if the failure is not for more than one month, with an additional 5% for each additional month or fraction thereof during which the failure continues, not exceeding 25% in the aggregate.

5. Failure to notify. Any employe who fails to notify the department as required by § 71.64(2)(b)2 shall be subject to a penalty of $10.

6. Retirement plans. Any natural person who is liable for a penalty for federal income tax purposes under sec-



tion 72(m) (5), (q), (t) and (v), 4973, 4974, 4975 or 4980A of the internal revenue code is liable for 33% of the federal penalty unless the income received is exempt from taxation under § 71.05 (1) (a). The penalties provided under this subdivision shall be assessed, levied and collected in the same manner as income or franchise taxes.

7. Failure to keep records required by the department. Any taxes assessed upon information not contained in records required by the department under § 71.80 (9) to be kept by any person subject to an income or franchise tax shall carry a penalty of 25% of the amount of the tax. The penalty shall be in addition to all other penalties provided in this chapter.

8. Joint return replacing separate returns. If the amount shown as the tax by the husband and wife on a joint return filed under § 71.03 (2) (g) to (L) exceeds the sum of the amounts shown as the tax upon the separate return of each spouse and if any part of that excess is attributable to negligence or intentional disregard of this chapter, but without intent to defraud, at the time of the filing of that separate return, then 25% of the total amount of that excess shall be added to the tax.

(b) *Intent to defeat or evade.* 1. Income and franchise; all persons. With respect to calendar year 1985 or corresponding fiscal year and subsequent calendar or fiscal years, any person making an incorrect, or failing to make a, report, including a separate return filed by a spouse with respect to a taxable year for which a joint return is filed under § 71.03 (2) (g) to (L) after the filing of that separate return, and including a joint return filed by the spouses with respect to a taxable year for which a separate return is filed under § 71.03(2)(m) after the filing of that joint return, with intent, in either case, to defeat or evade the income or franchise tax assessment required by law, shall have added to the tax an amount equal to 100% of the tax on the entire under-

payment. No amount paid under this subdivision may be deducted from gross income and assesments hereunder may be made with respect to decedents. Amounts added to the tax under this subdivision shall be treated as additional taxes for all purposes of assessment and collection. Repeated late filing of an income or franchise tax return evinces an intent to defeat or evade the income or franchise tax assessment required by law.

2. Withholding. The penalties provided by this subdivision shall be paid upon notice and demand of the secretary of revenue or the secretary's delegates and shall be assessed and collected in the same manner as income or franchise taxes. Any person required to withhold, account for or pay over any tax imposed by this chapter, whether exempt under §§ 71.05 (1) to (3), 71.26 (1) or 71.45 or not, who intentionally fails to withhold such tax, or account for or pay over such tax, shall be liable to a penalty equal to the total amount of the tax, plus interest and penalties on that tax, that is not withheld, collected, accounted for or paid over. "Person," in this subdivision, includes an officer or employe of a corporation or other responsible person or a member or employe of a partnership or other responsible person who, as such officer, employe, member or other responsible person, is under a duty to perform the act in respect to which the violation occurs.

3. Employes' statements. Any person, whether exempt under § 71.05 (1) to (3), 71.26 (1) or 71.45 or not, required under § 71.65 (1) to furnish a written statement to an employe, who furnishes a false or fraudulent statement, or who intentionally fails to furnish a statement in the manner, at the time and showing the information required under § 71.65 (1), or rules prescribed with respect thereto, shall, for each such failure, be subject to a penalty of $20. "Person," in this subdivision, includes an officer or employe of a corporation or other responsible person or a member or employe of a partnership or other



responsible person who, as such officer, employe, member or other responsible person, is under a duty to perform the act in respect to which the violation occurs.

4. Exemption documents. Any employe who files a withholding exemption certificate, form or agreement under § 71.64(2)(b) or 71.66(1)(a), (2) or (3) with the intent to defeat or evade the proper withholding of tax under subch. X shall be subject to a penalty equal to the difference between the amount required to be withheld and the amount actually withheld for the period that the incorrect certificate, form or agreement was in effect.

5. Joint return after separate returns. If the amount shown as the tax by the husband and wife on a joint return filed under § 71.03(2)(g) to (L) exceeds the sum of the amounts shown as the tax on the separate return of each spouse and if any part of that excess is attributable to fraud with intent to evade tax at the time of the filing of that return, then 50% of the total amount of that excess shall be added to the tax.

6. Corporations. If a corporation files a false declaration of complete inactivity, or, after filing a declaration, becomes activated or reactivated and fails to file timely statements and information under this chapter covering such year or years of activity or reactivity its officers at the time of such filing or failure shall be jointly and severally liable for a civil penalty of $25 for such filing or each such failure, which penalty may be assessed and collected as income or franchise taxes are assessed and collected.

(2) CRIMINAL. (a) *Misdemeanor.* 1. All persons. If any person, including an officer of a corporation required by law to make, render, sign or verify any return, wilfully fails or refuses to make a return at the time required in § 71.03, 71.24 or 71.44 or wilfully fails or refuses to make deposits or payments as required by § 71.65(3) or wilfully renders a false or fradulent statement required by

§ 71.65(1) and (2) or deposit report or withholding report required by § 71.65(3), such person shall be guilty of a misdemeanor and may be fined not more than $10,000 or imprisoned for not to exceed 9 months or both, together with the cost of prosecution.

2. Penalties for certain false documents. Any person who wilfully makes and subscribes any return, claim, statement or other document required by this chapter that that person does not believe to be true and correct as to every material matter or who wilfully aids in, procures, counsels or advises the preparation of any return, claim, statement or other document that is false or fraudulent as to any material matter related to, or required by, this chapter may be fined not more than $10,000 or imprisoned for not more than 9 months or both, together with the cost of prosecution.

3. Divulging information. Any person who violates § 71.78 shall upon conviction be fined not less than $100 nor more than $500 or imprisoned for not less than one month nor more than 6 months or both.

4. Coercing employe to prepay taxes. Any employer found guilty of violating § 71.09(15)(d) may be fined not less than $25 nor more than $200 for each violation.

5. False withholding agreement. Any employe who wilfully supplies an employer with false or fraudulent information regarding an agreement with the intent to defeat or evade the proper withholding of tax under subch. X may be imprisoned for not more than 6 months or fined not more than $500, plus the costs of prosecution, or both.

6. Construction contractor surety bond. Any person who fails or refuses to comply with § 71.80(16) shall be fined not less than $300 nor more than $5,000.

(b) *Felony.* 1. False income tax return; fraud. Any person, other than a corporation, who renders a false or fradulent income tax reutrn with intent to defeat or evade



any assessment required by this chapter shall be guilty of a felony and may be fined not to exceed $10,000 or imprisoned for not to exceed 5 years or both, together with the cost of prosecution. In this subdivision, "return" includes a separate return filed by a spouse with respect to a taxable year for which a joint return is filed under § 71.03(2)(g) to (L) after the filing of that separate return, and a joint return filed by the spouses with respect to a taxable year for which a separate return is filed under § 71.03(2)(m) after the filing of that joint return.

2. Officer or corporation; false franchise or income tax return. Any officer of a corporation required by law to make, render, sign or certify any franchise or income tax return, who makes any false or fraudulent franchise or income tax return, with intent to defeat or evade any assessment required by this chapter shall be guilty of a felony and may be fined not to exceed $10,000 or imprisoned for not to exceed 5 years or both, together with the cost of prosecution.

3. Evasion. Any person who removes, deposits or conceals or aids in removing, depositing or concealing any property upon which a levy is authorized with intent to evade or defeat the assessment or collection of any tax administered by the department may be fined not more than $5,000 or imprisoned for not more than 3 years or both, together with the costs of prosecution.

4. Fraudulent claim for credit. The claimant who filed a claim for credit under § 71.07, 71.28 or 71.47 or subch. VIII or IX that is false or excessive and was filed with fraudulent intent and any person who assisted in the preparation or filing of the false or excessive claim or supplied information upon which the false or excessive claim was prepared, with fraudulent intent, may be fined not to exceed $10,000 or imprisoned for not to exceed 5 years or both, together with the cost of prosecution.

(3) LATE FILING FEES. If any person required under this chapter to file an income or franchise tax return fails

to file a return within the time prescribed by law, or as extended under § 71.03(7), 71.24(7) or 71.44(3), the department shall add to the tax of the person $30 in the case of corporations and in the case of persons other than corporations $2 when the total normal income tax of the person is less than $10, $3 when the tax is $10 or more but less than $20, $5 when the tax is $20 or more, except that $30 shall be added to the tax if the return is 60 or more days late. If no tax is assessed against any such person the amount of this fee shall be collected as income or franchise taxes are collected, and no person shall be allowed in any action or proceeding to contest the imposition of such fee.

(4) SALES AND USE TAX REPORTING. This section does not apply to the failure to report, or the incomplete or incorrect reporting of, sales and use taxes due under subch. III of ch. 77 on any return filed under this chapter.

71.91 Collection provisions. * * *

* * * *

(4) UNPAID TAX IS PERFECTED LIEN ON PROPERTY. If any person liable to pay any income or franchise tax neglects, fails or refuses to pay the tax, the amount, including any interest, addition to tax, penalty or costs, shall be a perfected lien in favor of the department of revenue upon all property and rights to property. The lien is effective at the time taxes are due or at the time an assessment is made and shall continue until the liability for the amount to be paid or for the amount so assessed is satisfied. The perfected lien does not give the department of revenue priority over lienholders, mortgagees, purchasers for value, judgment creditors and pledges whose interests have been recorded before the department's lien is recorded.

(5) WARRANT SHALL BE ISSUED. (a) If any income or franchise tax is not paid when due, the department of revenue shall issue a warrant to the sheriff of any county



of the state commanding the sheriff to levy upon and sell enough of the taxpayer's real and personal property found within the county to pay the tax with the penalties, interest and costs, and to proceed upon the property in the same manner as upon an execution against property issued out of a court of record, and to return the warrant to the department and pay to it the money collected, or the part of it that is necessary to pay the tax, penalties, interest and costs within 60 days after the receipt of the warrant, and deliver the balance, if any, after deduction of lawful charges, to the taxpayer.

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## APPENDIX F

## EXCERPTS OF RELEVANT PORTIONS OF THE ARIZONA CONSTITUTION, STATE STATUTES AND STATE REGULATIONS

### I. RELEVANT PROVISIONS OF THE ARIZONA CONSTITUTION:

**Article VI, § 14—Superior court; original jurisdiction**

Section 14. The superior court shall have original jurisdiction of:

* * * *

2. Cases of equity and at law which involve . . . the legality of any tax, impost, assessment . . . .

### II. RELEVANT PROVISIONS OF THE ARIZONA REVISED STATUTES ANNOTATED:

**Ariz. Rev. Stat. Ann. § 12-123 (1992):**

Jurisdiction and powers

A. The superior court shall have original concurrent jurisdiction as conferred by the constitution.

. . .

B. The court, and the judges thereof, shall have all powers and may issue all writs necessary to the complete exercise of its jurisdiction.

**Ariz. Rev. Stat. Ann. § 12-124 (1992):**

Appellate jurisdiction; issuance of writs

A. The superior court shall have appellate jurisdiction in all actions appealed from justices of the peace, inferior courts, boards and officers from which appeals may, by law, by taken.



**Ariz. Rev. Stat. § 12-161 (1992):**

Definition of tax court

A. In this chapter, unless the context otherwise requires, "tax court" means the tax department of the superior court in Maricopa county when exercising the original jurisdiction of the superior court over cases of equity and at law which involve the legality of any tax, impost or assessment.

**Ariz. Rev. Stat. § 12-168 (1992):**

Proceedings

A. Proceedings before the court are original, independent proceedings and shall be tried de novo.

B. If an action is an appeal from an order or determination of an administrative agency, the action shall be an original proceeding in the nature of a suit to set aside the order or determiation.

**Ariz. Rev. Stat. Ann. § 12-910 (1992):**

Scope of review

A. An action to review a final administrative decision shall be heard and determined with convenient speed. The hearing shall extend to all questions of law and fact presented by the entire record before the court. No new or additional evidence in support of or in opposition to a finding, order, determination or decision of the administrative agency shall be heard by the court, except in the event of a trial de novo . . . .

B. The trial shall be de novo if trial de novo is demanded in the complaint or answer of a defendant other than the agency . . . . When a trial de novo is available under the provisions of this section, it may be had with a jury upon demand of any party.

**Ariz. Rev. Stat. Ann. § 35-196.03 (Supp. 1992):**

Refunds for invalid tax laws; appropriation required

Notwithstanding any provision of law to the contrary, no monies may be paid from the state treasury to refund monies collected under a law imposing a tax if the law is declared invalid by a final judgment of a court of competent jurisdiction until the legislature has made a specific appropriation for that purpose after the judgment has become final.

**Ariz. Rev. Stat. Ann. § 42-115 (1991):**

Time limitations for credit and refund claims

A. The period within which a claim for credit or refund may be filed, or credit or refund allowed or made if no claim is filed, is the period within which the department may make an assessment under § 42-113.

* * * *

C. The failure to begin an action for refund or credit within the time specified in this section is a bar against the recovery of taxes by the taxpayer.

**Ariz. Rev. Stat. Ann. § 42-122 (1991):**

Appeal to the department; hearing

A. Except in the case of individual income taxes, a person from whom an amount is determined to be due under this article may apply to the department by a petition in writing within forty-five days after the notice of a proposed assessment made pursuant to § 42-118, subsection B or the notice required by § 42-117, subsection B is received, or within such additional time as the department may allow, for a hearing, correction or redetermination of the action taken by the department. In the case of individual income taxes the period is ninety days from the date



the notice is mailed . . . . If only a portion of the deficiency assessment is protested, all unprotested amounts of tax, interest and penalties must be paid at the time the protest is filed. The department shall consider the petition and grant a hearing, if requested. To represent the taxpayer at the hearing or to appear on the taxpayer's behalf is deemed not to be the practice of law.

* * * *

C. All orders or decisions made on the filing of a petition for a hearing, correction or redetermination become final thirty days after notice has been received by the petitioner, unless the petitioner appeals the order or decision to the state board.

**Ariz. Rev. Stat. Ann. § 42-124 (1991):**

Appeal to state board and to court

A. A person aggrieved by a final decision or order of the department under this article may appeal to the state board . . . . The board's decision is final on the expiration of thirty days from the date when notice of its action is received by the taxpayer, unless either the department or the taxpayer brings an action in superior court as provided in subsection B.

B. The department or a taxpayer aggrieved by a decision of the board may bring an action in superior court subject to the following provisions:

1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.

2. . . . Within the limits set forth in § 42-115, a taxpayer who fails to protest the payment of any tax illegally or erroneously collected may file a claim for refund of the taxes paid. Such refund claim shall

then be governed by § 42-130 and this section. The superior court shall hear and determine the appeal as a trial de novo. . . .

**Ariz. Rev. Stat. Ann. § 42-130 (1991):**

Denial of refund

A. If the department disallows any claim for refund, it shall notify the taxpayer accordingly. The department's action on the claim is final unless the taxpayer appeals to the department in writing within the time and in the manner prescribed by § 42-122. If the department disallows interest on any claim for refund, it shall notify the taxpayer accordingly and thereafter the claim shall be treated as a claim for refund.

B. If the department fails to mail notice of action on any claim for refund of tax or interest within six months after the claim is filed, the taxpayer, prior to mailing of notice of action on the refund claim, may consider the claim disallowed. The taxpayer may appeal to the department for a hearing pursuant to § 42-122.

**Ariz. Rev. Stat. Ann. § 42-134 (Supp. 1992):**

Interest

A. If it is provided by law that interest applies as determined pursuant to this section, the department shall apply the rate of interest, compounded annually, established by the director in the same manner and at the same times as prescribed by § 6621 of the United States internal revenue code. On January 1 of each year the department shall add any interest outstanding as of that date to the principal amount of the tax. For purposes of this section the amount added to the principal is thereafter considered a part of the principal amount of the tax and accrues interest pursuant to this section.



B. If the tax, whether determined by the department or the taxpayer, or any portion of the tax is not paid on or before the date prescribed for its payment the department shall collect, as a part of the tax, interest on the unpaid amount at the rate determined pursuant to this section from the date prescribed for its payment until it is paid .

**Ariz. Rev. Stat. Ann. § 42-136 (Supp. 1992):**

Civil penalties; definition

A. If a taxpayer fails to make and file a return for a tax administered pursuant to this article on or before the due date of the return or the due date as extended by the department, then unless it is shown that the failure is due to reasonable cause and not due to wilful neglect, five per cent of the tax found to be remaining due shall be added to the tax for each month or fraction of a month elapsing between the due date of the return and the date on which it is filed. . . .

* * * *

D. A person who fails to pay the tax within the time prescribed shall pay a penalty of ten per cent in addition to the tax, unless it is shown that the failure is due to reasonable cause and not due to wilful neglect. . . .

E. In the case of a deficiency, for which a determination is made of an additional amount due, which is due to negligence but without intent to defraud, the person shall pay a penalty of ten per cent of the amount of deficiency.

F. If part of a deficiency is due to fraud with intent to evade tax, fifty per cent of the total amount of the tax, in addition to the deficiency, interest, and other penalties provided in this section, shall be assessed, collected and paid as if it were a deficiency.

* * * * *

H. A person who, with or without intent to evade any requirement of this article or any lawful administrative rule of the department under this article, fails to file a return or to supply information required under this article or who, with or without such intent, makes, prepares, renders, signs or verifies a false or fraudulent return or statement or supplies false or fraudulent information shall pay a penalty of not more than one thousand dollars. . . .

I. If the taxpayer files what purports to be a return of any tax administered pursuant to this article but which is frivolous or which is made with the intent to delay or impede the administration of the tax laws, that person shall pay a penalty of five hundred dollars.

**Ariz. Rev. Stat. Ann. § 42-137 (1991):**

Criminal violations; classifications; place of trial, definition

* * * *

B. It is a class 5 felony to:

1. Knowingly fail to pay any tax administered pursuant to this article due or believed due by the taxpayer with intent to evade the tax.

**Ariz. Rev. Stat. Ann. § 43-1001 (1980):**

Definitions

In this chapter, unless the context otherwise requires:

1. "Arizona adjusted gross income" of a resident individual means his Arizona gross income subject to modifications specified in §§ 43-1021 and 43-1022.

2. "Arizona gross income" of a resident individual means his federal adjusted gross income for the taxable year, computed pursuant to the Internal Revenue Code.



**Ariz. Rev. Stat. Ann. § 43-1022 (1980) (current version at § 43-1022 (Supp. 1992)):**

Subtractions from Arizona gross income

In computing Arizona adjusted gross income, the following amounts shall be subtracted from Arizona gross income:

* * * *

3. Benefits, annuities and pensions received from the state retirement system, the state retirement plan, the judges' retirement fund, the public safety personnel retirement system or a county or city retirement plan.

4. Income received as annuities under the United States civil service retirement system from the United States government service retirement and disability fund, in an amount not to exceed two thousand five hundred dollars.

**Ariz. Code Ann. § 73-1544(e) (1939) (repealed)**

(e) If the commission shall fail or neglect to act on any claim for refund or credit within one [1] year after the receipt thereof, such neglect shall have the effect of allowing such claim and the commission shall certify such refund or credit.